In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 647

SALLIE M. HADNOTT, ET AL., ETC., APPELLANTS

v.

MABEL S. AMOS, ETC., ET AL.

MEMORANDUM FOR THE UNITED STATES

In light of the "Motion for Order to Show Cause" recently filed by appellants in this Court, we deem it appropriate to advise the Court of the action taken by the district court in this case on motion of the United States.

On November 20, 1968, the United States filed a series of motions in this case in the United States District Court for the Middle District of Alabama (constituted as a court of three judges) seeking relief in several respects similar to that sought by appellants' motion. On November 21, 1968, the district court entered orders:

> (1) designating the United States as an *amicus curiae* and a party in the case for the purpose of vindicating the district court's order of September 18, 1968, reinstated by this Court on October 14 and October 19, 1968, and, generally,

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to preserve the integrity of the judicial process (Appendix, *infra,* pp. 5–7);

(2) adding as parties defendant in the district court the officials of Greene County, Alabama, responsible for conducting the November 5, 1968, general election, J. Dennis Herndon, Judge of Probate, William E. Lee, Sheriff, and Mary C. Yarbrough, Circuit Clerk, and the residents of Greene County who were purportedly elected on November 5, 1968, as either a Commissioner of Greene County or a member of the Greene County Board of Education, G. D. Seale, J. E. Henderson, Homer E. Carpenter, W. Herman Drummond, Hugh Gould, and Richard Owens (Appendix, *infra,* pp. 9–10);

(3) directing the Judge of Probate, the Sheriff and the Circuit Clerk of Greene County, Alabama, and the Secretary of State of the State of Alabama, to show cause on December 20, 1968, why they should not be restrained, pending a final determination of this action, from giving effect to the results of the November 5, 1968, election in Greene County for the offices of County Commissioner and Board of Education; and directing G. D. Seale, J. E. Henderson, Homer E. Carpenter, W. Herman Drummond, Hugh Gould and Richard Owens, residents of Greene County, Alabama, who received the highest number of votes cast for the offices of County Commissioner and member of the Greene County Board of Education respectively in the November 5, 1968, election, to show cause on the same date why they should not be restrained, pending a final determination of this action, from assuming or taking office in Greene County (Appendix, *infra,* pp. 11–12; see also pp. 13–20).

We attach to this memorandum copies of the orders referred to, together with the motion for an order to show cause filed by the United States (Appendix, *infra*, pp. 13–20), reference to which is necessary to determine the scope of the order issued thereon.

A further comment may be appropriate. Because the outstanding judgment of the court below denies the basic claim of the appellants that they were entitled to appear on the ballot, and this Court has not yet considered the case on its merits, nor even noted probable jurisdiction of the appeal, the United States has hesitated to pray for an order directing a new election in Greene County. Yet, as a practical matter, nothing short of that will afford effective relief: an order temporarily enjoining the implementation of the election held November 5 will have no present effect as against five of the six candidates whose election is challenged because they are incumbents and will therefore continue in office as hold-overs even after their present terms expire.

This, of course, was not the result anticipated by the Court when it re-instated the district court's temporary restraining order and denied the motion to advance the case. Had that order been followed in Greene County and appellants been elected (as seems likely), those of them who were chosen to serve on the County Board of Education presumably would have assumed office this November, as soon as the results of the election were certified (see Ala. Code 1958, Tit. 52, Sec. 65), and those chosen as Commissioners would assume office on January 20, 1969 (Ala. Code 1958,

Tit. 41, Sec. 18), if no final decision was rendered by that time. In the circumstances, the Court may wish to reconsider its order of October 19, 1968, denying appellants' motion to advance the case on its docket.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1968.

APPENDIX

In the United States District Court for the Middle District of Alabama, Northern Division

Civil Action No. 2757–N

SALLIE M. HADNOTT; REVEREND WILLIAM MCKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR.; AND THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, A CORPORATION FOR THEMSELVES JOINTLY AND SEVERALLY, AND FOR ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, UNITED STATES OF AMERICA, AMICUS CURIAE AND PARTY

v.

MABEL S. AMOS, AS SECRETARY OF STATE OF THE STATE OF ALABAMA; EDWARD A. GROUBY, AS JUDGE OF PROBATE FOR AUTAUGA COUNTY, ALABAMA; AND ALL OTHER JUDGES OF PROBATE OF THE STATE OF ALABAMA, JOINTLY AND SEVERALLY, WHO ARE SIMILARLY SITUATED; ALBERT BREWER, AS GOVERNOR OF THE STATE OF ALABAMA; MACDONALD GALLION, AS ATTORNEY GENERAL OF THE STATE OF ALABAMA, AND THEIR SUCCESSORS IN EACH OFFICE, DEFENDANTS

ORDER APPOINTING AND DESIGNATING THE UNITED STATES AS AMICUS CURIAE AND AS PARTY

Upon consideration of the papers filed by the United States in the above-styled case and the relief sought by the United States, this Court is of the

opinion that the maintenance and preservation of the due administration of justice and the integrity of the judicial process requires that the public interests be represented in these proceedings. To this end, this Court is of the opinion that it is now appropriate and necessary that the United States should be designated to appear and participate in this action before this Court and to accord this Court the benefit of its views and recommendations, with the right to submit pleadings, evidence, arguments and briefs, the right to move for injunctive and other necessary and proper relief, and the right to initiate such further proceedings that may be necessary and appropriate. *Faubus* v. *United States,* 254 F. 2d 797 (8th Cir. 1958), *cert. denied,* 358 U.S. 829; *Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916 (E.D. La. 1960), *aff'd.* 365 U.S. 569; *Bush* v. *Orleans Parish School Board,* 190 F. Supp. 861 (E.D. La. 1960), *aff'd* 366 U.S. 212; *Bush* v. *Orleans Parish School Board,* 191 F. Supp. 871 (E.D. La. 1961), *aff'd* 367 U.S. 908, *rehearing denied* 368 U.S. 870; *United States* v. *Barnett,* 330 F. 2d 369 (5th Cir. 1962), *decision on certified question,* 376 U.S. 681; *Lee* v. *Macon County Board of Education,* 231 F. Supp. 743 (M.D. Ala. 1964); *Miles* v. *Dickson,* Civil Action No. 2326–N (M.D. Ala., June 15, 1966); *Alabama NAACP State Conference of Branches* v. *George C. Wallace,* Civil Action No. 2457–N (M.D. Ala.).

In accordance with the foregoing and for good cause, it is the ORDER, JUDGMENT and DECREE of this Court that the United States of America be and it is hereby designated to appear and participate in this action before this Court as amicus curiae and as a party, with the right as such to submit pleadings, evidence, arguments and briefs, to move for injunctive and other necessary and proper relief, and to initiate

such further proceedings that may be necessary and appropriate.

It is the further ORDER of this Court that the Attorney General of the United States, and such attorneys in the United States Department of Justice as he may designate, be and he is hereby appointed to appear and participate in behalf of the United States in this action.

Done this 21st day of November, 1968.

(S) JOHN C. GODBOLD, FMJ,
Circuit Judge.

(S) FRANK M. JOHNSON, Jr.,
District Judge.

(S) VIRGIL PITTMAN, FMJ,
District Judge.

In the United States District Court for the Middle District of Alabama, Northern Division

Civil Action No. 2757–N

SALLIE M. HADNOTT, ET AL., PLAINTIFFS
UNITED STATES OF AMERICA, AMICUS CURIAE AND PARTY

v.

MABEL S. AMOS, ET AL., DEFENDANTS

ORDER APPROVING THE MOTION OF THE UNITED STATES AS AMICUS CURIAE AND AS A PARTY TO ADD PARTIES DEFENDANT

Upon consideration of the motion of the United States to add parties defendant in the above-styled case pursuant to Rule 21, Federal Rules of Civil Procedure, the Court is of the opinion that the maintenance and preservation of the due administration of justice and the integrity of the judicial process of the United States make it necessary that the requested parties defendant be added.

It is, therefore, the ORDER, JUDGMENT, and DECREE of this Court that the following be added as parties defendant to the above-styled case: J. Dennis Herndon, as Judge of Probate of Greene County, Alabama; William E. Lee, as Sheriff of Greene County, Alabama; Mary C. Yarbrough, as Circuit Clerk of Greene County, Alabama; G. D. Seale, J. E. Henderson, Homer E. Carpenter, W. Herman Drummond, Hugh Gould and Richard Owens, residents of Greene

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County, Alabama and Democratic Party candidates for local office in Greene County in the November 5, 1968 General Election.

Done this 21st day of November, 1968.

(s) JOHN C. GODBOLD, FMJ,
Circuit Judge.

(s) FRANK M. JOHNSON, Jr.,
District Judge.

(s) VIRGIL PITTMAN, FMJ,
District Judge.

In the United States District Court for the Middle District of Alabama, Northern Division

Civil Action No. 2757–N

SALLIE M. HADNOTT, ET AL., PLAINTIFFS, UNITED STATES OF AMERICA, AMICUS CURIAE AND PARTY

v.

MABEL S. AMOS, ET AL., DEFENDANTS.

ORDER

The Court, having considered the Motion for Order to Show Cause submitted by the United States in this action, it is ORDERED, ADJUDGED, and DECREED that the defendants J. Dennis Herndon, Judge of Probate for Greene County, Alabama; William E. Lee, Sheriff of Greene County, Alabama; Mary C. Yarbrough, Circuit Clerk of Greene County, Alabama; G. D. Seale, J. E. Henderson, Homer E. Carpenter, W. Herman Drummond, Hugh Gould and Richard Owens, residents of Greene County, Alabama and Democratic Party candidates for local office in Greene County in the November 5, 1968 General Election, appear before this Court in the Courtroom of the United States District Court, Montgomery, Alabama, on December 20, 1968 at 9:30 o'clock a.m. and there and then show cause, if any they or any of them have, why they and each of them should not be enjoined in accordance with the attached Motion of the United States for an Order to Show Cause.

It is FURTHER ORDERED that the defendant William E. Lee, Sheriff of Greene County, shall not, pending the show cause hearing, destroy or cause to

be destroyed, any ballots cast by any voters at any box, including absentee ballots, in the Greene County General Election, November 5, 1968, or any tally sheets, certificates of results or other election stationery used in said election.

It is FURTHER ORDERED that the defendants J. Dennis Herndon, William E. Lee, Mary C. Yarbrough, G. D. Seale, J. E. Henderson, Homer E. Carpenter, W. Herman Drummond, Hugh Gould, and Richard Owens shall not, pending the show cause hearing, destroy or cause to be destroyed any letters, communications, or records of communications pertaining to the General Election of November 5, 1968, or to this case.

The United States Marshal shall forthwith serve a copy of this Order and the attached Motion of the United States for an Order to Show Cause upon defendants Mabel S. Amos, J. Dennis Herndon, William E. Lee, Mary C. Yarbrough, G. D. Seale, J. E. Henderson, Homer E. Carpenter, W. Herman Drummond, Hugh Gould and Richard Owens.

DONE and ORDERED this 21st day of November, 1968.

(S) JOHN C. GODBOLD, FMJ,
Circuit Judge.

(S) FRANK M. JOHNSON, JR.,
Circuit Judge.

(S) VIRGIL PITTMAN, FMJ,
Circuit Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1968

In the United States District Court for the Middle District of Alabama

Northern Division

Civil Action No. 2757–N

SALLIE M. HADNOTT; REVEREND WILLIAM MCKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR., AND THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, A CORPORATION FOR THEMSELVES JOINTLY AND SEVERALLY, AND FOR ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, UNITED STATES OF AMERICA, AMICUS CURIAE AND PARTY

v.

MABEL S. AMOS, AS SECRETARY OF STATE OF THE STATE OF ALABAMA; EDWARD A. GROUBY, AS JUDGE OF PROBATE FOR AUTAUGA COUNTY, ALABAMA; AND ALL OTHER JUDGES OF PROBATE OF THE STATE OF ALABAMA JOINTLY AND SEVERALLY, WHO ARE SIMILARLY SITUATED; ALBERT BREWER, AS GOVERNOR OF THE STATE OF ALABAMA, MACDONALD GALLION, AS ATTORNEY GENERAL OF THE STATE OF ALABAMA, AND THEIR SUCCESSORS IN EACH OFFICE; J. DENNIS HERNDON, AS JUDGE OF PROBATE FOR GREENE COUNTY, ALABAMA; WILLIAM E. LEE, AS SHERIFF OF GREENE COUNTY, ALABAMA; MARY C. YARBROUGH, AS CIRCUIT CLERK OF GREENE COUNTY, ALABAMA; G. D. SEALE; J. E. HENDERSON; HOMER E. CARPENTER; W. HERMAN DRUMMOND; HUGH GOULD; AND RICHARD OWENS, DEFENDANTS

MOTION FOR ORDER TO SHOW CAUSE

1. This action was commenced September 13, 1968, as a class action to require the defendants, state and

local officials of the State of Alabama, to place upon the official ballots for the November 5, 1968 general election, the names of the National Democratic Party of Alabama candidates for federal, state and local offices.

2. The plaintiffs herein are the National Democratic Party of Alabama and officers and candidates of the National Democratic Party of Alabama (hereafter referred to as the NDPA).

3. The original defendants in this case are the Secretary of State, the Governor and the Attorney General of the State of Alabama and the Probate Judge of Autauga County, Alabama, as representative of the Judges of Probate of the State of Alabama.

4. The United States as amicus curiae has filed a motion requesting this court to add as parties defendant J. Dennis Herndon, the Probate Judge of Greene County, Alabama; William E. Lee, Sheriff of Greene County, Alabama; Mary C. Yarbrough, Circuit Clerk of Greene County, Alabama; G. D. Seale, J. E. Henderson, Homer E. Carpenter and W. Herman Drummond, Democratic Party candidates for County Commissioner; and Hugh Gould and Richard Owens, Democratic Party candidates for Greene County Board of Education. The only candidates for County Commissioner and Board of Education whose names appeared on the Greene County General Election ballots were these Democratic Party candidates.

5. Alabama law imposes on defendants, Herndon, Lee and Yarbrough, by virtue of their respective offices, the duty to conduct general elections in Greene County. Such duties include the duty of defendant Herndon as Probate Judge, to cause the names of all candidates to be printed on the official ballots.

6. On September 18, 1968, upon order of this court each Judge of Probate of the State of Alabama was

ordered to prepare or print ballots which included the nominees of the NDPA, and the use, display, or circulation of official ballots not including the names of the nominees of the NDPA was barred. A copy of that order is attached hereto.

7. Among the nominees of the NDPA designated in the court's order of September 18, 1968 for inclusion on the Greene County ballots were the names of candidates for four places on the County Commission and for two places on the County Board of Education. Those candidates were:

Vassie Knott for County Commissioner, District No. 1;
Harry C. Means for County Commissioner, District No. 2;
Levi Morrow, Sr. for County Commissioner, District No. 3;
Frenchie Burton for County Commissioner, District No. 4;
Robert Hines for Greene County Board of Education, Place No. 1;
J. A. Posey, Sr. for Greene County Board of Education, Place No. 2.

8. In compliance with the order of September 18, 1968, absentee ballots were printed for Greene County, Alabama, with the names of the federal, state, and local candidates of the NDPA. These absentee ballots, printed prusuant to instructions given by defendant Herndon, were delivered to him on September 24, 1968. A copy of the absentee ballot is attached as Exhibit A.

9. After a hearing on the merits this court on October 11, 1968, entered its opinion and order which dissolved the temporary restraining order of September 18, 1968, and enjoined the defendants from omitting from the official ballot the names of the nominees of the NDPA only insofar as such omission was based

upon a letter and affidavits purporting to contain evidence of the failure of the NDPA to hold a mass meeting in Huntsville, Alabama, on May 7, 1968.

10. The plaintiffs noticed an appeal to the Supreme Court of the United States accompanied by an application for restoration of temporary relief. On October 14, 1968, the Supreme Court of the United States restored the district court's restraining order pending oral argument on the application. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (Monday, October 14, 1968), Orders in Pending Cases, p. 14, No. 647, *Sallie M. Hadnott, et al., appellants* v. *Mabel S. Amos, etc., et al.* On October 19, 1968, the Supreme Court of the United States continued the order of October 14, 1968, restoring tempofary relief pending action upon the jurisdictional statement. JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (Saturday, October 19, 1968) Order in Pending Case, p. 68, No. 647. *Sallie M. Hadnott, et al., appellants* v. *Mabel S. Amos, etc., et al.*

11. On October 14, 1968, defendant Herndon ordered the printing of the regular ballots and specified that on the Greene County portion of the ballot the names of the nominees of the NDPA were to be deleted. The ballots, so printed, were delivered to defendant Herndon on October 17, 1968. A copy of the regular ballot is attached as Exhibit B. Herndon and/or attorneys representing him had knowledge of the October 14 and October 19 orders of the Supreme Court of the United States.

12. During the period between October 14 and the election, defendant Herndon did not advise the NDPA officers or the NDPA candidates for local office that the names of such candidates would not appear on the official ballot to be used at the polls. During the

same period when interested persons requested sample ballots defendant Herndon gave them copies of the absentee ballot without advising such persons that the regular ballot did not contain the names of the NDPA candidates for local office. During this same period, the NDPA candidates for local office continued to campaign, fully expecting that their names would be on the official ballot.

13. On November 5, 1968, the general election was held in Greene County, Alabama, under the supervision and direction of defendants Herndon, Lee and Yarbrough, who delivered to election officials the ballots described in paragraph 11, above.

14. During the course of the general election held in Greene County, Alabama, on November 5, 1968, approximately 3976 persons voted at the polls and approximately 171 persons voted absentee. In each race in which the names of the NDPA candidates appeared on the ballot used at the polls, the NDPA candidates received a majority of the votes cast. Of the approximately 4147 persons who voted in Greene County, 2036 voters cast a straight NDPA ticket by placing an "X" under the party emblem. The defendant Democratic Party nominees for County Commissioner and Board of Education received approximately the following number of votes.

Name	Office	Votes
G. D. Seale	County Commissioner, District No. 1	1709
J. E. Henderson	County Commissioner, District No. 2	1702
Homer E. Carpenter	County Commissioner, District No. 3	1709
W. Herman Drummond	County Commissioner, District No. 4	1704
Hugh Gould	Greene County Board of Education, Place No. 1	1708
Richard Owens	Greene County Board of Education, Place No. 2	1699

15. The distribution and use in the Greene County general election of the ballots without the names of the NDPA nominees for local office was in violation

of this court's order of September 18, 1968, as restored by the orders of October 14 and October 19, 1968, of the Supreme Court of the United States.

Wherefore, in order to protect and preserve the judicial process, to uphold the authority of the courts of the United States, and to maintain the integrity of the electoral process, the United States as amicus curiae moves the court to order the defendants Herndon, Lee, Yarbrough, Seale, Henderson, Carpenter, Drummond, Gould and Owens to show cause why they and each of them should not be restrained, pending a final determination of this action, from giving effect to the results of the Greene County General Election of November 5, 1968, for the offices of county commissioner and board of education, by the issuance of an injunction, as follows:

1. J. Dennis Herndon, Judge of Probate, Greene County, Alabama, and Mary C. Yarbrough, Circuit Clerk, Greene County, Alabama, be restrained from certifying the results of the November 5, 1968, Greene County, Alabama, General Election for the following offices:

County Commissioner, District No. 1
County Commissioner, District No. 2
County Commissioner, District No. 3
County Commissioner, District No. 4
County Board of Education, Place No. 1
County Board of Education, Place No. 2

2. Mabel S. Amos, Secretary of State of the State of Alabama, be restrained from issuing a commission as Commissioner, Greene County, Alabama, to any of the following:

G. D. Seale
J. E. Henderson
Homer E. Carpenter
W. Herman Drummond

3. G. D. Seale, J. E. Henderson, Homer E. Carpenter, and W. Herman Drummond be restrained from taking the oath of office as commissioners, Greene County, Alabama, and are also restrained from assuming or taking office as Commissioners of Greene County, Alabama.

4. Hugh Gould and Richard Owens be restrained from taking the oath of office as members of the Board of Education of Greene County and from assuming or taking office as members of the Board of Education of Greene County, Alabama.

5. William E. Lee, Sheriff of Greene County, Alabama, be restrained from destroying or causing to be destroyed any ballots cast by any voter at any box, including absentee ballots, in the Greene County General Election, November 5, 1968, or any tally sheets, certificates of results, or other election stationery used in said election.

6. Any certification of the results of the Greene County, Alabama General Election of November 5, 1968, for county commissioner and board of education, qualification of the Democratic Party candidates for said offices, or commissioning of said candidates be declared null and void for the duration of this restraining order.

7. Defendants Herndon, Lee, Yarbrough, Seale, Henderson, Carpenter, Drummond, Gould and Owens be restrained from destroying or causing to be destroyed any letters, communications, or records of communication pertaining or relating to the General Election of November 5, 1968, or to this case.

This motion is based upon the pleadings and evidence already in the record in this case, the attached exhibits, and evidence to be adduced at the hearing.

(s) RAMSEY CLARK,
Attorney General.
(s) STEPHEN J. POLLAK,
Assistant Attorney General.
(s) BEN HARDEMAN,
United States Attorney.
(s) FRANK M. DUNBAUGH,
(s) JOHN T. NIXON,
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U.S. Department of Justice.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 3 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 647

SALLIE M. HADNOTT; REVEREND WILLIAM McKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR.; and THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, a corporation, for themselves jointly and severally, and for all others similarly situated,

Appellants,

—v.—

MABEL S. AMOS, as Secretary of the State of Alabama; EDWARD A. GROUBY, as Judge of Probate for Autauga County, Alabama; and all other Judges of Probate of the State of Alabama, jointly and severally, who are similarly situated; ALBERT P. BREWER, as Governor of the State of Alabama; MACDONALD GALLION, as Attorney General of the State of Alabama, and their successors in each office,

Appellees,

EDWARD F. MAULDIN, as Chairman of Alabama Citizens for Humphrey-Muskie, for himself and all other persons similarly situated,

Appellee-Intervenor,

and,

JAMES DENNIS HERNDON, Judge of Probate of Greene County, Alabama,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
AND IN THE MATTER OF CONTEMPT OF COURT
BY JAMES DENNIS HERNDON.

APPELLANTS' BRIEF AND APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 647

SALLIE M. HADNOTT; REVEREND WILLIAM MCKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR.; and THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, a corporation, for themselves jointly and severally, and for all others similarly situated,

Appellants,

—v.—

MABEL S. AMOS, as Secretary of the State of Alabama; EDWARD A. GROUBY, as Judge of Probate for Autauga County, Alabama; and all other Judges of Probate of the State of Alabama, jointly and severally, who are similarly situated; ALBERT P. BREWER, as Governor of the State of Alabama; MACDONALD GALLION, as Attorney General of the State of Alabama, and their successors in each office,

Appellees,

EDWARD F. MAULDIN, as Chairman of Alabama Citizens for Humphrey-Muskie, for himself and all other persons similarly situated,

Appellee-Intervenor,

and,

JAMES DENNIS HERNDON, Judge of Probate of Greene County, Alabama,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA
AND IN THE MATTER OF CONTEMPT OF COURT BY JAMES DENNIS HERNDON.

APPELLANTS' BRIEF

Opinion Below

The majority and dissenting opinions of the United States District Court for the Middle District of Alabama are not yet reported.[1] They are at pages 539-67 of the Record.

Jurisdiction

A Temporary Restraining Order was issued by the District Court on September 18, 1968 (R. 237). This order was dissolved on October 11, 1968 (R. 569), following a hearing on the merits held on September 30, 1968 (R. 405-06). Notice of Appeal was filed on the same day (R. 571-72), an application for temporary relief was filed on the following day, the temporary relief was ordered restored by this Court on October 14, 1968, oral argument was had here on October 18, 1968, and the order continuing the temporary relief herein was entered on October 19, 1968. Probable jurisdiction was noted by order entered December 16, 1968, calling for appellants' brief to be filed by January 3, 1969.

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. § 1253. The following decisions sustain jurisdiction: *Florida Lime and Avocado Growers Inc.* v. *Jacobsen,* 362 U. S. 73 (1960); *Sterling* v. *Constantin,* 287 U. S. 378 (1932).

On November 15, 1968, appellants transmitted to this court their Motion for Order to Show Cause as to Why

[1] The opinion of the District Court on an ancillary matter (a motion to quash subpoena for taking of the deposition of the Governor) is reported at 291 F. Supp. 309.

James Dennis Herndon, Judge of Probate, Greene County, Alabama, Should Not Be Held in Contempt of This Court and to Set Aside the Results of the Election in Said County and Cause New Elections to Be Held Therein.[2] The order noting probable jurisdiction set this motion for hearing together with the appeal.

This Court has inherent power to hear and try defendant Herndon for the allegedly contemptuous violation of its orders of October 14 and 19, 1968. Statutory jurisdiction therefor is conferred by 18 U. S. C. § 401(3), and 28 U. S. C. § 1651(a). The following decisions sustain this jurisdiction: *United States* v. *Shipp*, 203 U. S. 563, 573 (1906); *Merrimack River Savings Bank* v. *City of Clay Center*, 219 U. S. 527, 536 (1911).

Constitutional Provisions and Statutes Involved

This action involves article I, sections 2 and 3, article II, section 1, as amended by the twelfth amendment, and the first, ninth, fourteenth, fifteenth and seventeenth amendments of the Constitution of the United States. Additionally involved are interpretations of Sections 2, 4(a) and (c), and 5 of the Voting Rights Act of 1965, 42 U. S. C. §§ 1973, 1973b(a) and (c), and 1973c; 18 U. S. C. § 401(3); and 28 U. S. C. § 1651(a).

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[2] Thereafter, on November 20, 1968, the United States filed a series of motions in this case in the United States District Court for the Middle District of Alabama seeking relief in several respects similar to that sought by appellants' motion. These pleadings are described in the Memorandum for the United States filed herein dated November 1968; the district court's orders on these motions are included as an appendix to that Memorandum. Appellants' response to the Memorandum was transmitted to this Court on November 27, 1968. On December 20, 1968, the District Court enjoined the opponents of the NDPA local candidates in Greene County, Alabama, from assuming office.

The facial or applicatory constitutionality or illegality of the following provisions of Alabama law are also involved: Title 17, §§ 125, 145(3) (the "Garrett Law"), 148, and 274-75, Code of Alabama (Recomp. 1958).

The applicable portions of each constitutional and statutory provision are set out in the Appendix at pp. 1a-13a.

Questions Presented

1. Whether the Garrett Law (Title 17, § 145(3) Code of Alabama (Recomp. 1958)) is unconstitutional on its face and in its application or is in violation of Section 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c, in the following respects:

a. Its requirement that a candidate file a notice of intention eight months prior to the general election is arbitrary, capricious and unreasonable and in violation of the due process and equal protection clauses of the fourteenth amendment.

b. It invidiously discriminates against minority political parties and their members in violation of the equal protection clause of the fourteenth amendment.

c. It was racially motivated, or alternatively has a racially exclusive effect, is invidiously discriminatory, and perpetuates white-only political office retention in the state of Alabama in violation of the first, ninth, fourteenth and fifteenth amendments of the Constitution of the United States.

d. Its effect is unjustifiably to prevent plaintiffs from seeking elective office and effectively to disenfranchise plaintiffs and the class they represent in violation of article

I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment), the first, ninth, fourteenth, fifteenth, and seventeenth amendments of the Constitution of the United States.

e. It was enacted in 1967, erecting a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964, but it has been neither the subject of an action for a declaratory judgment nor has it been submitted to the Attorney General of the United States for approval (Alabama being a state with respect to which determinations have been made under section 4(b) of the Voting Rights Act of 1965, 42 U. S. C. § 1973b).

2. Whether Title 17, §§ 274-75, Code of Alabama (Recomp. 1958) are unconstitutional on their face and in their application, said sections not having been relied upon by defendants prior to the filing of this suit, but having been invoked against all NDPA nominees, regardless of their compliance therewith, after suit was brought, in the following respects:

a. They are unconstitutionally vague and overbroad and consequently facially violative of the first amendment, and the due process clauses of the fifth and fourteenth amendments, they being essentially penal statutes (*id.* §§ 276 and 332).

b. They have been unequally and unconstitutionally applied to the plaintiffs herein in violation of article I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment) and the first, fifth, fifteenth, and seventeenth amendments and the due process clause and equal

protection clause of the fourteenth amendment of the Constitution of the United States.

c. There is no reasonable relationship between the evil which the statutes were intended to correct and the time requirements or the penalty (removal from the ballot), said provisions thereby being arbitrary and capricious and effecting a deprivation of the right to vote, all in violation of the first amendment, the due process clauses of the fifth and fourteenth amendments, the equal protection clause of the latter amendment, the fifteenth and seventeenth amendments, and article I, sections 2 and 3, and article II, section 1 (as amended by the twelfth amendment) of the Constitution of the United States.

d. Section 274, *id.*, constitutes a test or device prohibited by sections 4 and 11(a) of the Voting Rights Act of 1965, 42 U. S. C. §§ 1973b and i(a).

3. Whether the refusal of the appellees to place the names of NDPA nominees on the ballot deprived plaintiffs and the class they represent of the right to vote a straight ticket (a right otherwise guaranteed them by the law of Alabama, Title 17, §§ 97, 157, Code of Alabama (Recomp. 1958), and assured those who desire to vote a straight ticket for the nominees of Alabama's Democratic and Republican Parties), in that said action, particularly when coupled with the placing of the American Independent Party ("AIP") Presidential Elector nominees on the Alabama Democratic Party column rather than on that of the AIP and the placing of the names of Presidential Elector candidates pledged to the national Democratic Party Presidential candidates on a separate column (candidates for no other offices appearing thereon), deprived

plaintiffs and the class they represent, many of whom are illiterate or inexperienced voters, of the equal right to vote in violation of the due process and equal protection clauses of the fourteenth amendment, the fifteenth and seventeenth amendments, article I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment) and the first and ninth amendments, all of the Constitution of the United States, and 42 U. S. C. §§ 1981, 1983, the Voting Rights Act of 1965, and 42 U. S. C. §§ 1971-73p, more particularly, sections 2, 4, and 11(a) thereof, 42 U. S. C. §§ 1973, 1973(b), 1973i(a), creating a "test or device" prohibited thereby.

4. Whether Title 17, § 148, Code of Alabama (Recomp. 1958) (prohibiting appearances of the same names on the ballot more than once or under more than one party emblem) is facially unconstitutional and unconstitutional in its application to plaintiffs in that it violates article I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment), the first, ninth, the due process and equal protection clauses of the fourteenth amendment, the fifteenth and seventeenth amendments, all of the Constitution of the United States, and the Voting Rights Act of 1965, 42 U. S. C. §§ 1971-73p; there being an unequal application of the statute and, additionally, agreement by plaintiffs to run for Presidential Elector on their own column those Presidential Elector candidates pledged to support the nominees of the national Democratic Party who then appeared as candidates on a separate ticket (no candidates for other office appearing thereon), said agreement to apply if the votes in both columns be cumulatively totaled.

5. Whether Title 17, § 125, Code of Alabama (Recomp. 1958) which in effect provides that election officials will

be chosen solely by the two established major parties, is facially unconstitutional and unconstitutional in its application to plaintiffs (particularly when, as here, there were more than two parties on the ballot) in that it violates article I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment), the first, ninth, the due process and equal protection clauses of the fourteenth amendment, the fifteenth and seventeenth amendments, all of the Constitution of the United States and the Voting Rights Act of 1965, 42 U. S. C. §§ 1971-73p.

6. Whether the appellees deprived plaintiffs and the Negro and other voters of Alabama of the equal right to vote for candidates of their own choosing and to have those votes counted in violation of the due process and equal protection clauses of the fourteenth amendment, the right freely to express themselves as guaranteed by the first amendment, the right to vote and run for political office regardless of race as guaranteed by the fourteenth and fifteenth amendments and the rights retained by the people as guaranteed by the ninth amendment, all of the Constitution of the United States. The action complained of was the refusal to place the nominees of NDPA on the ballot for the November 5, 1968 general election despite their substantial compliance with the state's election laws.

7. Whether defendant James Dennis Herndon should be held in civil or criminal contempt, or both, for violation of this Court's orders of October 14 and 19, 1968, by his failure or refusal to place the names of NDPA candidates upon the ballot in Greene County, Alabama, and, if found guilty of civil contempt or criminal contempt or both the remedy or punishment to be ordered therefor.

Statement of the Case

a. *The Prelude.*

Beginning in late 1967 appellants[3] organized and incorporated the National Democratic Party of Alabama ("NDPA"), a racially integrated political party (Cashin[4] 209-19), which was accepted by the defendant Secretary of State as a political party, and allowed the use of a party emblem. NDPA proceeded to nominate candidates for local and state office at mass meetings on May 7, 1968, in accordance with Title 17, §§ 413-16, Code of Alabama (Recomp. 1958) (*E.g.*,[5] R. 181-86). A state convention of NDPA delegates selected at the mass meetings was held in Birmingham, Alabama, on July 20, 1968, and candidates for state and national office were selected (*E.g.*, R. 149-52).

On August 14, 1968, following the preparation and filing with her of papers by Alabama Democratic Party officials, the defendant Secretary of State, herself a Presidential Elector nominee pledged to support, if elected, the can-

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[3] Appellants were plaintiffs in the court below and will be referred to herein as plaintiffs; appellees were defendants below and will be referred to herein as defendants. Defendant James Dennis Herndon will be referred to by name where the subject matter particularly relates to him.

[4] Nineteen depositions were taken in the case in chief and were all admitted into evidence at R. 403; they are certified as exhibits and thus are not paginated into the Record; since the November 5, 1968 general election, 16 additional depositions have been taken in the District Court and a motion is being filed there to cause their transmission to this Court; therefore all depositions will be cited by the surname of the deponent and the page of or exhibit to that deposition.

[5] Many statements herein are supported numerous times in the Record, thus exemplary citations will sometimes be used.

didacy of George C. Wallace for the Presidency (Brewer 9), stated that unless the NDPA chairman proved the Huntsville mass meeting was held she would cause the exclusion of the NDPA and its nominees from the general election ballot (R. 179).

Later she publicly indicated that she had changed her mind and intended to certify the party and its nominees if they filed certificates of nomination with her by September 5, 1968 (R. 177-78). On September 5, 1968, the NDPA certificates were filed, she stating that the papers were in order (Cashin 203).

Thereafter, on September 10, 1968, the Secretary of State issued a public statement of her intention to certify only two NDPA nominees as candidates (*Id.* 204).

b. *This Case in the Court Below.*

On September 13, 1968, this action was filed; plaintiffs seeking declaratory and injunctive relief to place the names of nominees of the NDPA on the ballot for the November 5, 1968 general election. Additionally, they sought to enjoin on the grounds of facial and applicatory unconstitutionality the enforcement of certain Alabama election laws.

A statutory three-judge district court was convened on September 16, a hearing was held (R. 360), and a Temporary Restraining Order granting plaintiffs relief was issued on September 19 (R. 237). On September 30, a hearing was held on preliminary and permanent relief (R. 388). Thereafter, on October 11, 1968, the District Court filed its opinion, Judge Frank M. Johnson dissenting. The District Court decided that substantial federal constitutional questions had been raised and that the Secretary of State and

the defendant Judges of Probate by relying upon the alleged non-holding of the Huntsville mass meeting as grounds for the denying of certification had violated the fourteenth amendment, but held the questioned Alabama statutes constitutional on their face and in their application. Plaintiffs immediately filed their notice of appeal.

c. *Additional Facts.*

The Secretary of State had denied that the evidence for the NDPA mass meeting, alone among the various parties, was adequate, and had only one other ground for refusing registration—that some NDPA candidates had failed to file declarations of intention of candidacy on March 1, 1968 (250 days prior to the November 5, 1968, general election), as required by the Garrett Law (Amos 5). Thus, only one of the two original grounds for the denial of certification remains; and that involves the constitutionality or legality of the Garrett Law.

At the September 16, 1968, hearing on Motion for Temporary Restraining Order the District Court ordered counsel to certify to the court before 9:00 a.m. September 18, 1968, "the names of persons or the names of such of your groups of candidates as are not qualified on grounds other than those raised in this lawsuit" (R. 379). Counsel for defendants were directed regarding any such other grounds "to furnish [by letter] that information to Mr. Morgan with a copy to this Court" (R. 384).

On the afternoon of September 17, 1968, counsel for defendants furnished their letter which stated, in part:

> In addition, under the case of *Herndon* v. *Lee,* 199 So. 2d 74 (Ala.), a candidate must comply with Section 274, Title 17, Code of Alabama 1940, Recompiled 1958,

within 5 days after certificates of the mass meetings of May 7, 1968, were filed in the Probate Offices and with the Secretary of State. No such compliance or designation or statements were filed as required by said Section 274; hence all of said candidates designated on plaintiffs' schedule under the *Herndon* case are ineligible to have their names placed upon the ballot or ballots for the November election. Section 275, Title 17, Code of Alabama 1940, Recompiled 1958 (R. 234).

Thus, by the state's own interpretation of sections 274-75, *supra,* the last day for filing the designations or statements required was midnight, September 10, 1968.[6] During that day the Secretary of State publicly announced that NDPA nominees would not be certified as candidates.

Thus, the sole second remaining and latest ground for deprivation of the right to run for public office and the equal right to vote was:

(a) " . . . invoked strictly as an afterthought"[7] after NDPA nominees were forced to file suit to become even potential candidates; and

(b) after the Secretary of State publicly announced *during the five day statutory period* provided by sec-

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[6] "The evidence as to the Secretary of State is that filing dates are carefully watched and late filings not accepted." Majority opinion (R. 547). At no place in the opinion, the statute, or the record is the proper date for filing set forth. Herndon v. Lee, 281 Ala. 61, 199 So. 2d 74 (1967), and this letter firmly establish September 5, 1968, as the date on which the five day filing period must normally begin to run.

[7] Johnson, *J.*, dissenting (R. 563).

tion 274, *supra*, that they were not to be allowed to be candidates; and

(c) even though immediately after the Temporary Restraining Order allowing plaintiffs to be candidates was entered (by September 20, 1968) the Statement was filed by counsel with every Judge of Probate of Alabama and with the Secretary of State (R. 246).

As a matter of fact, however, at least 30 of the nominees had filed the required statement for their office as a part of their Garrett Law declaration of intent and at least six others filed such a statement as part of a declaration for a different office of different numbered Presidential Elector place (R. 97-133). Nevertheless the state persisted, as shown by its letter and answer, in attempting to disqualify "each and every one" of the NDPA nominees (R. 278).

On these two grounds—that not all of them told the state they intended to run for office 250 days before the election and that some of them told the state they were designating themselves as the persons to receive campaign contributions, at most, nine days too late—89 candidates (R. 262-64) for public office, most of them Negro candidates for local office, were to be denied or have seriously jeopardized, their right to participate in the general election.[8]

d. *The Secretary of State and the Unequal Application of the Law to Negro and Non-Experienced Voters.*

Defendant Mabel Amos, Secretary of State, received and did not respond to the following letter:

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[8] In the case of local offices the determination of who goes on the ballot is made by the county Judge of Probate, Title 17, §145, Code of Alabama (Recomp. 1958). The Secretary of State and all Judges of Probate are white and all but one of them are members of the Wallace-dominated Alabama Democratic Party.

3-25-68

Hi Mabel—

Enclosed are the 150 party emblems—per your request. Please send the 150 back to me (the ones which had the motto marked out).

Congratulations on your diligent efforts, which resulted in the disqualification of some liberals.

Regards

Bill Mori
[Chairman of the Alabama Conservative Party]
(Amos Pl. Exh. J)

Defendant Amos' predecessor had assisted the Alabama Conservative Party in its formation[9] (Amos 37-39), and Mrs. Amos had not questioned the Conservatives' certifying that they had held their statutory mass meeting at a motel (Amos Pl. Exh. H) rather than "in the immediate vicinity of the voting place . . . " as required by Title 17, § 414, Code of Alabama (Recomp. 1958).

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[9] This is not entirely consistent with the district court's rationale, for, as the majority said in upholding the application of the Garrett Law:

> Those political groups in Alabama more formally and more permanently organized and familiar with election procedures will find compliance with the statement of intent law easier than those who are not. But this difference alone presents no constitutional infirmity. The same problem will exist with regard to any requirements of the election laws regardless of the details of the electoral machinery provided by the state (R. 556).

Further inequalities were:

(1) The American Independent Party of Alabama was placed on the ballot even though it filed a certificate which failed to set forth the date of holding of a "mass meeting." The technique?—defendant Amos simply accepted a new certificate and the Party dismissed its lawsuit. See *Turner* v. *Amos*, C. A. No. 2756-N (M. D. Ala., Sept. 16, 1968).

(2) The Prohibition Party filed the names of more candidates for elector than Alabama had electoral votes and failed to number the places for which its nominees were offered. They were allowed a place on the ballot, defendant Amos advising them into compliance with her requirements (Amos 77-80).

(3) The district court said:

> The information [upon which Mrs. Amos denied certification to the entire slate of NDPA] consisted of a letter from two residents of Huntsville who had no personal knowledge of whether the mass meeting was held, accompanied by affidavits of two persons containing "evidence" of the most slender nature, largely circumstantial and in part hearsay,[10] attempting to negative the certification that the meeting had been held (R. 559).

Her action thereon "was a violation of basic principles of equal protection, due process and essential fairness" (R. 560).

This "evidence" was received by Mrs. Amos on Wednesday, August 14, 1968 (Amos Pl. Exh. A), five days before the Committee on Credentials of the 1968 Democratic National Convention convened. She denied she knew her pub-

[10] The only affiant in the vicinity was blind (Marlow *passim*).

lic prediction that she would deny certification would be used against NDPA which was mounting a well publicized challenge in opposition to the ADP and AIDP delegations. She protested political innocence[11] (Amos 108). Yet, as particularly shown by the ADP brief before the credentials committee, her public prediction was used, and used effectively (Cashin 229-32A).

(4) As noted by Judge Johnson, dissenting:

> The best of laws [Title 17, §§ 274-275, Code of Ala. (Recomp. 1958) The Corrupt Practices Law], however, can be invoked in an unworthy manner. Here, it was invoked strictly as an afterthought. As the majority concedes:
>
> > "When the Secretary of State declined to certify to the Judges of Probate NDPA candidates who filed nominations in her office, she did not assert failure to comply with the Act as one of her motivations. Her motivation is irrelevant to a judicial determination of whether the Act is constitutional *on its face.*" (Emphasis added.)
>
> The Corrupt Practices Act has not fallen into disuse. Nor, as the cases cited by the majority indicate, has the remedy of disqualification. In all those cases, however, the Act was invoked by opposing candidates or by concerned voters. Alabama state officials having

[11] Regarding her political acumen, the Governor said:

> A. Oh, yes, Mrs. Mabel has been a public servant for many years, even before I knew her, continuously during this period of time. She had handled, during this period of time matters that are politically quite sensitive, almost as a daily occurrence in her official duties.
>
> I don't think anyone questions her integrity or her ability to deal quite fairly with any situation (Brewer 18).

She has worked in the offices of six Alabama governors (Amos 109).

adopted a consistent practice of relying on party and public policing and enforcement of this Act, it is not tolerable for this Court to allow these officials to make their first foray in the enforcement direction against a small, new, and almost surely impecunious group of candidates seeking to form a new party in Alabama. This is particularly true when the defendant officials who are taking such action are candidates for Presidential electors on the ballot of an opposing party. Whether or not a formal conflict of interest, this circumstance, when conjoined with those above, justified the inference that the Corrupt Practices Act, fair on its face, has been:

> "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . ." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-74 (1886).

In this vital area of the right to vote and to run for office, the courts must not hesitate to exercise their judicial duty to ensure an evenhanded application of the Alabama election laws (R. 563-64).

(5) No more clear proof of unequal protection in the application of the Corrupt Practices Act could appear than is found in the post-election evidence compiled regarding the action of the defendant Herndon. There the Negro candidates filed all documents filed by the white candidates and then some (Herndon 59-60). See also Appendix to the brief of the United States, *amicus curiae*, filed herein.

Despite this their names were not placed on the ballot.[12]

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[12] The acts of defendant Herndon are fully explored, *infra*, pp. 59-85.

c. *The Role of AIDP.*

The formal organization of NDPA was delayed when, in December, 1967, it was learned that the Alabama Independent Democratic Party ("AIDP") had been incorporated (Cashin 213). Considerable discussion, among those interested in forming NDPA and with AIDP people, ensued (*id.* 214)[13]; it appeared that AIDP might be an appropriate or helpful vehicle for advancing the twin goals of NDPA—insuring for once an opportunity for Alabamians to vote for the Democratic Presidential nominee[14] (R. 71), and providing a means for political participation by Alabama citizens in liberal politics on an integrated, non-separatist basis, without regard to the politics of race.[15] At a meeting on December 30, 1967, the chairman of AIDP and the regular Alabama Democratic Party ("ADP"), (which until 1966 had the words "White Supremacy" on its official ballot emblem) jointly explained the

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[13] Negotiations have continued almost to this day—at R. 356 is a stipulation between counsel for plaintiffs and the AIDP chairman to the effect that, if the prohibition of Title 17, Section 148, Code of Alabama (Recomp. 1958) against multiple appearances of names on the ballot could be avoided, both parties would consent to the listing of AIDP Presidential Elector nominees in the NDPA column as well, and the NDPA Elector nominees would be withdrawn (both slates are pledged to the Humphrey-Muskie ticket).

[14] This opportunity was not available in Alabama in four of the last six Presidential elections.

[15] It is judicially known to the federal courts of Alabama and the Fifth Circuit that race and politics have been inseparable there. See, *e.g.*, Smith v. Paris, 257 F. Supp. 901, 904 (M. D. Ala. 1966), modified and aff'd, 386 F. 2d 979 (5th Cir. 1967). The state's political structure is substantially all white (Cashin 216-17). Defendants illustrate the habit of racial thinking by attaching to their answer affidavits of a Judge of Probate, Mayor, and Town Clerk referring to an NDPA candidate as "one J. H. Davis, Negro" (R. 292, 293, 327). *Cf.* Anderson v. Martin, 375 U. S. 399, 404 (1964).

device whereby ADP delegates could show compliance with the anti-discrimination mandate of the Democratic Party nationally, thereby assuring its delegates of seats at the Democratic National Convention (Cashin 215). This plan involved AIDP's running a separate slate of elector nominees pledged to the national Presidential ticket, but running no other candidates for any office. To insure this the AIDP Articles of Incorporation stated:

> The corporation shall not have the power to nominate any candidate for national, local or state public office, except presidential election.
>
> * * * * *
>
> The party shall have no members (R. 79).

ADP electors, inevitably to be pledged to George C. Wallace, and ADP candidates for other national, state and local offices would run on a single ballot column (Cashin 215-19). As said at this meeting, this would "protect" the "some 2000 Democratic offices located throughout the State and they want to protect those, and they want George Wallace electors to carry that . . ." (*Id.* 217; see *Id.* 232A for the explanation of this by ADP at the Democratic National Convention).

Although AIDP is forbidden to have members or nominate candidates for office except Presidential Elector no experienced politician who testified had ever heard of a "political party" so limited (*E.g.* Amos 89, Grouby 9). NDPA, on the other hand, has a substantial membership including a large number of Negroes and politically inexperienced, sometimes illiterate, voters (Cashin 180-81; see, *e.g.* Walbert *passim*); it adopted a platform (R. 153-62),

an almost unheard of species of document in Alabama state politics. Yet AIDP nominees for Presidential Elector were certified[16] (Amos 91); NDPA nominees were not.

f. The November 5, 1968 General Election Ballot.

It was contended below that the form of ballot sought by defendants would effectively deprive plaintiffs and thousands of Negro citizens of their right to vote and that ballot is on its face a prohibited "test or device" calling for a degree of understanding not possessed by many literate let alone illiterate voters. See the sample ballot, Exhibit G to Amos. If defendants are successful: (a) Those who desire to vote for the candidates of the Alabama Republican Party need simply pull one lever or mark one ("x") to do so. (b) Those who desire to vote for the candidates of the ADP need simply pull one lever or mark one ("x") to do so.[17] (c) Those who desire to vote for the national nominees of the Democratic Party will pull one lever or mark one ("x") to do so and then move across the seven columns on the face of the ballot attempting to select candidates for local, state and national office. Without NDPA they will find few, if any, Negro or white liberal candidates there.

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[16] Although, as defendant Amos put it, "This is a splinter party, this is not a party, as I understand. It is a party within a party" (Amos 89).

[17] And thereby cast their ballots for George C. Wallace, a nominee for President on a third party slate in states other than Alabama. Plaintiffs and the class they represent did not desire to do this. Nor did they desire to be limited in their choices with regard to other state and local officials. For example, they had neither a desire to vote for ADP nominee Eugene "Bull" Connor for President of the Public Service Commission nor for his Alabama Republican Party opponent.

Only plaintiffs complain of this discrimination between voters, which, in effect, serves as a scheme or device to lock voters previously excluded therefrom into the ADP and will inevitably deprive some voters of the right to cast ballots for candidates of their own choosing.

That the right to vote a straight ticket is essential to the less than literate voter seems clear. He either has that right or: (1) He must wander across a complicated ballot, or (2) seek help in casting his vote.[18]

Ironically, straight ticket voting appears to be guaranteed by Alabama law. Title 17, Sections 97, 157, Code of Alabama (Recomp. 1958).

Summary of Argument

Plaintiffs contend that the existence or unequal application of certain Alabama statutes denies them the various rights guaranteed them by the Constitution of the United States and the Voting Rights Act of 1965, 42 U. S. C. §§ 1971-73p, *i.e.*, the assurance to them as citizens, and more particularly as newly enfranchised Negro citizens, of full and meaningful participation in the political process. The foundation of these rights is the fifteenth amendment, the fourteenth amendment, particularly the equal protection clause, and the preeminent position of political expression

[18] An Alabama Judge of Probate, a veteran politician recognized the value to any party, including NDPA, of straight ticket voting (Grouby 29), and that both illiterate and literate voters may have to

> "ask the election official, tell him what party he wants to vote for. If he wants to vote for the National Democratic Party, or the Democratic Party of Alabama, whichever one he is voting for, and the two of them will go in the booth with him and show him which label he wants to vote on" (Grouby 30).

under the first amendment. The passage of the Voting Rights Act of 1965 resulted in the first real and effective twentieth century enfranchisement of large numbers of potential Negro voters and candidates. The Act, if strongly implemented, will remove what, considering the centrality of the vote to democracy, must have been an even more onerous badge of slavery than the segregation of Negroes into ghettoes so forcefully condemned in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). Particular facets of the argument may be summarized as follows:

The Garrett Law, requiring a declaration of intention some 250 days before the election, is too heavy a "burden . . . on the right to vote and to associate." *Williams* v. *Rhodes*, 89 S. Ct. 5, 11 (1968). In the *Williams* case a similar aspect of the Ohio election laws was most explicitly dealt with in the district court's opinion, this court affirming the declaration of unconstitutionality. Analogy to the reasoning of *Harman* v. *Forsennius*, 380 U.S. 528 (1965) is particularly apt. And when considered with the other statutes at issue herein, its application to Alabama Negro voters newly emerging into political prominence under the Voting Rights Act must fall as the Ohio laws did in *Williams*.

As distinct ground for the invalidity of the Garrett Law, it has not been submitted to the Attorney General as required by the Voting Rights Act of 1965 § 5, 42 U. S. C. § 1973c. It is just as much an abridgment of the right to vote to deprive the voter of candidates as it is to deprive him of the right to enter the voting booth.

After the filing of this suit, and apparently as an afterthought, the State invoked a blunderbuss application of its

Corrupt Practices Act (the Alabama courts have said that the use of the word "corrupt" is something of a misnomer, *Jones* v. *Phillips*, 278 Ala. 354, 185 So. 2d 378, 381 (1966)). Under the facts of this case, plaintiffs contend that they did actually comply with the Act, and there is little doubt that they complied with its purpose, any failure of literal compliance amounting to no more than a few days and resulting in no prejudice to anyone.

The state is estopped to rely on the challenged sections, Title 17 §§ 274-75 Code of Alabama (Recomp. 1958) because the Secretary of State's action in refusing to certify the nominees (which action must have served as precedent for the Probate Judges) tolled the running of the statute and additionally rendered filing of the required statement an apparent futility. There is authority in various fields of law to the effect that performance of a futile act which on its face may appear to be a prerequisite is not required. See, *e.g.*, 1 K. C. Davis, *Administrative Law Treatise* § 2.04 (1958); 3 *id.* § 20.01.

It is strongly indicated that this Act is applied with much more particularity to Negro candidates, including plaintiffs, than to white candidates. It is impossible to compile a precise history on this particular point since, prior to two years ago, Negroes did not run for office in Alabama (the reasons for this fact having relevance to the situation). Additionally it is contended that the statutory scheme, disqualifying as it does the candidates for trivial oversight, is in violation of the fourteenth amendment as not providing the least drastic alternative to a legitimate state end and, taken as a whole, particularly where the disenfranchisement is wholesale, is a test or device prohibited by the Voting Rights Act of 1965 § 4, 42 U. S. C. § 1973b.

The prohibition in Title 17, § 148 Code of Alabama (Recomp. 1958) against the appearance of candidates more than once on the ballot deprives plaintiffs of equal protection of the laws in that it is arbitrary and irrational, particularly in juxtaposition with rights of the magnitude here involved. Further it has the effect, albeit unintended, of in this case making the exercise of the franchise so difficult as to constitute a test or device prohibited by the Voting Rights Act and a denial of equal protection. The effect of this section is to deprive plaintiffs of the benefits of straight-ticket voting (a right guaranteed to other political parties in Alabama), and at the same time unduly to complicate the ballot.

Title 17, § 125 Code of Alabama (Recomp. 1958) is on its face a blatant violation of equal protection in that it limits the selection of persons to be placed in positions of discretion and authority over the conduct of the election to those chosen by the two major political parties. Major party domination of the electoral process is condemned in *Williams* v. *Rhodes, supra.*

After this Court's orders of October 14 and 19, 1968, James Dennis Herndon, Judge of Probate of Greene County, Alabama failed to cause the NDPA nominees to appear on the ballot exercising a contempt of this Court. The proof will show that he has no substantial defense; the Court's authority to punish in proceedings such as this is clear. *United States* v. *Shipp,* 203 U. S. 563 (1906), 214 U. S. 386 (1909), 215 U. S. 580 (1909). In addition his failure to place the nominees on the ballot amounted to a destruction of the subject matter of litigation pending an appeal, action condemned by *Merrimack River Savings Bank* v. *City of Clay Center,* 219 U. S. 527 (1911).

ARGUMENT

I.

The Case in Chief.

A. *The Racial Background of Alabama Politics and the NDPA.*

In only one election since 1944 have those Alabama voters who desire to cast a full and meaningful vote for the Democratic Presidential nominee been able to do so.[19]

The political structure of no other American state has so successfully deprived voters of their right to vote.

In 1968 while a former Governor of Alabama sought a place on the Ohio ballot for himself, Alabama Presidential Elector candidates pledged to his support attempted to deny NDPA and its candidates a place on the ballot.[20]

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[19] " . . . but it has never seemed to be a difficult matter to obtain ballot position in Alabama," says defendant Brewer (Brewer 21-22).

[20] Alabama election practices, in their racial context, have been before this Court and the lower United States courts many times. Moody v. Flowers, 387 U. S. 97 (1967); Reynolds v. Sims, 377 U. S. 533 (1964); Alabama v. United States, 371 U. S. 37 (1962); Gomillion v. Lightfoot, 364 U. S. 339 (1960); Smith v. Paris, 386 F. 2d 979 (5th Cir. 1967); Gilmore v. Greene County Democratic Executive Comm., 368 F. 2d 328 and 370 F. 2d 919 (5th Cir. 1966); Dent v. Duncan, 360 F. 2d 33 (5th Cir. 1966); United States v. Bruce, 353 F. 2d 474 (5th Cir. 1965); United States v. Scarborough, 348 F. 2d 168 (5th Cir. 1965); United States v. Logue, 344 F. 2d 290 (5th Cir. 1965); United States v. Mayton, 335 F. 2d 153 (5th Cir. 1964); United States v. Atkins, 232 F. 2d 733 (5th Cir. 1963); Kennedy v. Bruce, 298 F. 2d 860 (5th Cir. 1962); Alabama *ex rel.* Gallion v. Rogers, 285 F. 2d 430 (5th Cir. 1961), *cert. denied*, 366 U. S. 913 (1961); Gray v. Main, Civ. No. 2430-N (M. D. Ala., filed July 5, 1966); United States v. Executive Comm. of the Demo-

Thus this case arises from the first state-wide attempt of Negro and white voters to wend their way through the tortuous maze of Alabama's election laws. NDPA members are mostly people who have never been a part of the political process, people to whom the political structure had traditionally been hostile. See, *e.g.*, United States Commission on Civil Rights, *Political Participation* (1968) (herein cited as *Political Participation*).

Ideally, to avoid conflict with the inevitably strict state construction of Alabama's election laws, the following should have been accomplished before March 1, 1968, (the date by which declarations of intention to run for office are required by the Garrett Law):

1. The organization of the state and every county and congressional district, with sufficient publicity to reach

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cratic Party of Greene County, 254 F. Supp. 543 (N. D. Ala. 1966) (the other named defendants were the Democratic Executive Committees of Sumter and Marengo Counties and the Judges of Probate of all three counties, including defendant James Dennis Herndon); United States v. Executive Comm. of the Democratic Party of Dallas County, 254 F. Supp. 537 (S. D. Ala. 1966); Sellers v. Trussell, 253 F. Supp. 915 (M. D. Ala. 1966), *appeal dismissed*, 385 U. S. 19 (1966); United States v. Clark, 249 F. Supp. 720 (S. D. Ala. 1965); Reynolds v. Katzenbach, 248 F. Supp. 593 (S. D. Ala. 1965); Simms v. Baggett, 247 F. Supp. 96 (M. D. Ala. 1965); Williams v. Wallace, 240 F. Supp. 511 (M. D. Ala. 1965); United States v. Parker, 236 F. Supp. 511 (M. D. Ala. 1964); United States v. Cartwright, 230 F. Supp. 873 (M. D. Ala. 1964); United States v. Penton, 212 F. Supp. 193 (M. D. Ala. 1962); Sellers v. Wilson, 123 F. Supp. 917 (M. D. Ala. 1954); United States v. Strong, 10 RACE REL. L. REP. 710 (1965); United States v. Hines, 9 RACE REL. L. REP. 1332 (1964); United States v. Ford, 9 RACE REL. L. REP. 1330 (1964); United States v. Alabama, 7 RACE REL. L. REP. 1146 (1962); Gomillion v. Rutherford, 6 RACE REL. L. REP. 241 (1961); *In re* Gallion, 6 RACE REL. L. REP. 185 (1961); *In re* George C. Wallace, 4 RACE REL. L. REP. 97 (1959).

every person who might desire to be or be willing to become a potential candidate on the party's ticket;[21]

2. The obtaining of information about which offices would be filled in the November general election;

3. The obtaining of information about the qualifications for each such office and whether they are filled by election at large or from districts and whether the candidate must live in the district, ascertainment of the boundaries of the districts or beats or precincts represented by such offices (including intra-county districts, generally established by local acts);[22]

4. The dissemination of information about the foregoing;

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[21] The majority opinion below does not consider that some potential candidates do not "run" for nomination. Were the Garrett Act constitutional and applicable on a national level no major party candidate for the Vice-Presidency would have been eligible to serve in decades. Neither Messrs. Agnew nor Muskie nor LeMay, were declared candidates for the Vice-Presidency, for example. Additionally, in 1952 neither Gov. Stevenson nor President Eisenhower would have been eligible for nomination or election.

[22] On discovery the defendant Grouby, Judge of Probate of Autauga County, testified that district boundaries were set by local act, he and other local politicians knew them because they have been in politics all their lives, but about the only way a neophyte would find them out is to ask a politician, *e.g.*, a prospective opponent (Grouby 18-21). Judge Meeks, Judge of Probate of Jefferson County, testified that no definitive conclusion has been reached as to the proper interpretation of the statute setting up the places for election to the Jefferson County Board of Education (Meeks 15-16, 33). And see POLITICAL PARTICIPATION, ch. 2 "Preventing Negroes from Becoming Candidates or Obtaining Office," subchapter entitled "Withholding Information" 48 (An Alabama Judge of Probate refused to give civil rights workers advice on election laws on the grounds he, the Judge, was not a lawyer).

5. The obtaining of decisions from prospective candidates (and non-candidates willing to run) that they would, in fact, run; a decision by persons to be later nominated ("drafted" perhaps without their knowledge) more than two months later, an obvious impossibility and, in some sections of Alabama at least, a decision which if publicized may involve some personal risk;

6. The preparation, signing, finding of a notary public for acknowledgment (in some Alabama counties not too easy a task for Negroes), and filing of a paper by each prospective candidate.

Compare the Ohio district court majority's application of the doctrine of laches to a seventy-six-year-old political party and a one-man candidacy—"George C. Wallace has been a potential candidate for President of the United States for several years." *Socialist Labor Party* v. *Rhodes*, 290 F. Supp. 983, 991 (S. D. Ohio) (three-judge court), *modified and aff'd sub nom. Williams* v. *Rhodes*, 89 S. Ct. 5 (1968).

Then county and district mass meetings and a state convention must be arranged, convened, and held. Various certificates must be prepared, checked, signed and acknowledged by state and county party officials, and filed. And additionally, in the case of this party, the task of mounting a delegate challenge at the 1968 Democratic National Convention was undertaken. All of this must be done in addition to the normal incidents of running a political campaign.

Under the best of conditions this was a monumental task. And the difficulty was compounded by the necessity for reconciling ambiguous sections of the code and then re-

ferring to the case law.[23] And there were petty harassments—the Secretary of State, when time was of the essence, corresponded with NDPA by fourth class mail (Cashin 220); again, in response to a request for copies of the evidence which she had announced would cause her to deny ballot position to NDPA, she offered to sell *certified* copies to the party's chairman for $126 (12 copies of 5 pages) and the offer itself was not mailed to the address at which the chairman had advised her he would be (Amos 67-69). In its Answer, the State contended that some NDPA candidates had been "contacted" and desired to withdraw[24] (R. 285, 306). One of the Judges of Probate's response to the certificate of mass meeting filed by NDPA nominees for the purpose of getting on the ballot concluded:

> Personally, I do not think the paper you sent is worth the paper it is written on. I will discuss it with Mrs. Amos as to whether or not I will place the names on the ballot for the November election, or not (R. 196).

In fact the Secretary of State and Judges of Probate (see the affidavits attached to the Answer, R. 291-327)

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[23] For example, see Title 17 §§413 and 145, Code of Alabama (Recomp. 1958) which deal with selection of candidates by parties that do not hold primaries and the placing of them on the ballot, respectively. Literally, §145 would not make a §413 selection the exclusive means of selection; however, the case law, as shown by the annotations to §145, reveals that the section simply is not interpreted to mean what it says.

[24] *Cf.* Herndon v. Lee, 281 Ala. 61, 199 So. 2d 74 (1967) where the shoe was off the other foot: for technical reasons a withdrawal of candidacy was necessary at one point for the Negro candidate to be placed on the ballot and his oral withdrawal was held to be a nullity.

shifted the burden of responsibility established by Alabama Law. *Kinney* v. *House,* 243 Ala. 393, 10 So. 2d 167 (1942) held that the Judge of Probate may, even though he acts in a ministerial capacity, make investigation of an arguably defective certificate to determine whether the statutory requirements were met. But here the Judges, even without investigation, diligently sought grounds to reject certificates on their face value.

Despite state obstacles and even though dealing with inexperienced, sometimes illiterate or semi-literate, newly registered voters, many of whom do not even have telephones, the NDPA substantially complied with Alabama's undecipherable election law. The compliance may have been accidental but compliance it was.

B. *The Constitutional Imperatives.*

1. The Fourteenth and Fifteenth Amendments.

The right to participate in the political process whether it be running for public office, creating a political party, or voting for the candidate of one's choice is at the very heart of the democratic system. *Carrington* v. *Rash,* 380 U. S. 89 (1965). See *Reynolds* v. *Sims,* 377 U. S. 533, 555, 567 (1964); *Wesberry* v. *Sanders,* 376 U. S. 1, 17 (1964).

This Court has consistently held that qualified citizens have a constitutionally protected right to vote and have their votes counted. *Ex parte Yarbrough,* 110 U. S. 651 (1884); *United States* v. *Mosley,* 238 U. S. 383 (1915); *United States* v. *Classic,* 313 U. S. 299 (1941); *Baker* v. *Carr,* 369 U. S. 186 (1962); *Reynolds* v. *Sims,* 377 U. S. 533 (1964). The right to run for office, to give the voter someone for whom to have his vote counted, is the other side of the same coin:

> From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates. *United States* v. *Classic,* 313 U. S. 299, 318 (1941).

And:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "[T]he exercise of rights so vital to the maintenance of democratic institutions," *Schneider* v. *State of New Jersey,* 308 U. S. 147, 161 . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents. *Carrington* v. *Rash,* 380 U. S. 89, 94 (1965).

To secure this right Negroes have been forced to struggle against grandfather clauses[25], *Guinn* v. *United States,* 238 U. S. 347 (1915); poll taxes, *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); *Harman* v. *Forsennius,* 380 U. S. 528 (1965); educational and registration requirements, *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966); restrictions on membership in a political party, *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Nixon* v. *Herndon,* 273 U. S. 536 (1927); gerrymandering, *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); outright fraud and intimidation, *United States* v. *Classic,* 313 U. S. 299 (1941). Slowly at first—then

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[25] Compare the political heritage of ADP members who, as children, went into the cotton fields with their grandfathers as they campaigned for office (Mims 9, Little 8).

surely, then swiftly the courts and Congress moved against voter discrimination.

The cadence call on the march to equal voting rights was enunciated by Mr. Justice Frankfurter in 1939. The fifteenth amendment, he said, " . . . nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939).

It was under this judicial umbrella that Congress moved to adopt the Voting Rights Act upheld in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966) and *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966). And it is on this judicial and legislative landscape that this case arose.

2. The First Amendment.

Democratic government requires that all points of view be allowed expression. Even error has value as it helps reveal truth in its full dimension.

For many the essential meaning of the first amendment is that it protects all political thought and expression. See A. Meiklejohn, *Political Freedom* (1965). This facet of the first amendment has been emphasized:

> The maintenance of the opportunity for free political discussions to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. *Stromberg* v. *California*, 283 U. S. 359, 369 (1931). See *Garrison* v. *Louisiana*,

379 U. S. 64, 74-75 (1964); *Bond* v. *Floyd*, 385 U. S. 116 (1966); *Williams* v. *Rhodes*, 89 S. Ct. 5 (1968).

The further relationship of the first amendment to political activity is shown by the protection it provides to freedom of association. See, *e.g.*, *NAACP* v. *Alabama*, 357 U. S. 449, 460 (1958).

To deny plaintiffs their right to run for elective office, to vote for candidates of their own choosing, to have those votes counted, and those elected serve is more than a deprivation of fourteenth and fifteenth amendment rights. For here the very existence of the NDPA and the enhancement of advocacy gained by group association is threatened.

The end sought by those who speak politically is action based upon belief. Without candidates and a party organization plaintiffs, who are committed to racial integration and liberal economic policies, are deprived of their very means of expression and the opportunity to seek change by peaceful, lawful, and traditional methods.

Political campaigns involve or ought to involve more than the seeking of office for personal or political gain; they present opportunities for educating the citizenry. Plaintiffs simply seek the opportunity to continue a political program aimed at convincing a majority of Alabama's electorate that the interests of Negroes and whites are allied, their goals common. No higher priority exists in our constitutional democracy than the protection of legal means which provide an opportunity for accomplishing change. That is what this case is about.

3. Proof of Discrimination and the Burden Thereof.

Common sense, history[26], experience[27], and judicial precedent suggest that the gross discrepancy between Negro and white candidates for public office, and Negro and white public officeholders and state party officials raises at least an inference that Negroes have in fact been systematically and almost totally excluded from Alabama's political processes.

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[26] See E. M. MORGAN, BASIC PROBLEMS OF EVIDENCE 360 (1962): ". . . in most instances the historical fact is a subject of judicial notice"; *accord,* Morris v. Harmer's Heirs' Lessee, 32 U. S. (7 Pet.) 553, 558 (1833). For a number of years this has been the rule in the Fifth Circuit. See United States *ex rel.* Goldsby v. Harpole, 263 F. 2d 71, 82 (5th Cir.), *cert. denied* 361 U. S. 838 (1959) (". . . it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries."); Meredith v. Fair, 298 F. 2d 696, 701, *cert. denied* 371 U. S. 828 (1962); United States *ex rel.* Seals v. Wiman, 304 F. 2d 53 (5th Cir. 1962), *cert. denied,* 372 U. S. 915 and 924 (1963). Here, as in Seals, the discrimination is "long continued," 304 F. 2d at 67. See Smith v. Paris, 257 F. Supp. 901, 904 (M. D. Ala. 1966), *modified and aff'd,* 386 F. 2d 979 (5th Cir. 1967) and cases there cited (court must take into account the long history of racial discrimination in Alabama and view legislative purpose in this light). Regarding the effect of a history of discriminatory practices, see Patton v. Mississippi, 380 U. S. 128, 143, 144 (1965).

The judicial use of southern history in the racial-electoral context is illustrated by United States v. Louisiana, 225 F. Supp. 353 (E. D. La. 1963) (three-judge court), *aff'd,* 380 U. S. 145 (1965).

Unfortunately, we often " . . . need education in the obvious more than investigation of the obscure." HOLMES, LAW AND THE COURT, in COLLECTED LEGAL PAPERS 291, 292-93 (1921). "The plaintiffs here only want 'for the Court to see what "[a]ll others can see and understand • • •"' United States v. Mississippi (S. D. Miss., 1964), 229 F. Supp. 925, 998 (dissenting opinion) reversed, 1965, 380 U. S. 128 . . . ." Hamer v. Campbell, 358 F. 2d 215, 220 (5th Cir. 1966).

[27] *Cf.* the judicial cognizance based in part on the experience of this Court, in Walker v. City of Birmingham, 388 U. S. 307, 325 n. 1 (1967) (Warren, C.J., dissenting).

The existence of the gross discrepancy here is undisputed. In *United States* v. *Jefferson County Bd. of Educ.*, 372 F. 2d 836, 887 (1966), *aff'd on rehearing en banc*, 380 F. 2d 385 (5th Cir.), *cert. denied*, 389 U. S. 840 (1967), the court said:

> This Court has frequently relied on percentages in jury exclusion cases. Where the percentages of Negroes on the jury and jury venires is disproportionately low compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes [footnote omitted]. Percentages have been used in other rights cases [footnote omitted]. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools.

See the use of statistics in the first § 4(a) Voting Rights Act declaratory judgment action to come to trial, *Gaston County* v. *United States*, 288 F. Supp. 678 (D. D. C. 1968). There, according to the majority, the statistical showing that Negroes were more poorly educated than whites was sufficient to establish that the literacy test was a prohibited test or device; the concurrence was based only on the county's failure to adduce evidence to rebut the statutory presumption that the literacy test was discriminatory. The presumption also applies to Alabama. See also *Whitus* v. *Georgia*, 385 U. S. 545, 552, n. 2 (1967), citing Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966); *Brown* v. *Allen*, 344 U. S. 443, 473 (1953); *Smith* v. *Texas*, 311 U. S. 128, 130-31 (1940).

Moreover, where fundamental freedoms are involved, the state, not the challenging party, has the burden of demonstrating that equal protection and due process standards have been met. In *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), this Court striking down Virginia's poll tax, said:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined [citations omitted]. . . . the right to vote is too precious, too fundamental to be so burdened[23] or conditioned. 383 U. S. at 670.

Surely the same considerations apply here as in *Harper;* the defendants are not merely infringing on the rights of members of plaintiffs' class; they are seeking to deny them the essential right of free men—the right to vote.

It has been recognized in many instances that, in order to remedy past racial discrimination in the field of voting rights, a positive effort must be made to provide Negroes with the rights and opportunities previously denied them. *United States* v. *Louisiana*, 380 U. S. 145 (1965); *United States* v. *Duke*, 332 F. 2d 759 (5th Cir. 1964). See also Cox, *Constitutional Adjudication and the Promotion of*

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[23] But the majority below placed the burden on plaintiffs. "As a prerequisite to that relief at the hands of the court they [plaintiffs] must show that they are qualified to be on the ballot" (R. 547). Then, when plaintiffs attempted to meet that burden the majority did ". . . not decide the complex factual issues of whether mass meetings, including the Huntsville meeting, were held and whether candidates purportedly nominated at such meetings were validly certified" (R. 560). Thus plaintiffs were again put at the mercy of the very state officials who originally sought to disenfranchise them; *cf.* the contempt proceedings herein.

Human Rights, 80 HARV. L. REV. 93 *passim* (1966). "[T]he Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Bd. of Educ.*, *supra*, 372 F. 2d at 876. Negroes may have to be sought out purposely to be placed on jury lists. *Brooks* v. *Beto*, 366 F. 2d 1 (5th Cir.), *cert. denied*, 386 U. S. 975 (1966). It may be necessary to relax voter qualifications in order to equalize the opportunity of Negroes and whites to register to vote. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); *Gaston County* v. *United States*, 288 F. Supp. 678 (D. D. C. 1968).

As in *Williams* v. *Rhodes*, *supra*, 89 S. Ct. at 11, "[t]he State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate."

Here, as in *Williams*:

> Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past. *Id.* at 11.

Here, as in *Williams*, " . . . the totality of the . . . restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." *Id.* at 12.

As Mr. Justice Douglas said:

> When "fundamental rights and liberties" are at issue (*Harper* v. *Virginia Board*, *supra*, 670), a State has less

leeway in making classifications than when it deals with economic matters. I would think that a State has precious little leeway in making it difficult or impossible for citizens to vote for whomsoever they please and to organize campaigns for any school of thought they may choose, whatever part of the spectrum it reflects.

Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. It is unnecessary to decide whether Ohio has an interest, "compelling" or not, in abridging those rights, because "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Konigsberg* v. *State Bar*, 366 U. S. 36, 61 (1961) (Black, J., dissenting). Appellees would imply that "no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgment." (*Id.*, at 67.) I reject that suggestion [footnote omitted]. *Id.*, at 15 (Douglas, J., concurring).

"The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association," said Mr. Justice Harlan. *Id.*, at 16 (Harlan, J. concurring in results). And, he would have held the due process clause applicable. *Id.* at 17.

As Mr. Justice Harlan put it:

". . . with fundamental freedoms at stake, such an unlikely hypothesis cannot support an incursion upon

protected rights, especially since the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion. As both Ohio's electoral history [footnote omitted] and the actions taken by the overwhelming majority of other States [footnote omitted] suggest, opening the ballot to this extent is perfectly consistent with the effective functioning of the electoral process. In sum, I think that Ohio has fallen far short of showing the compelling state interest necessary to overcome this otherwise protected right of political association." *Id.* at 19.

Here, the concern of Mr. Justice Stewart seems met for in *Williams* he said, ". . . no claim has been or could be made in this case that anyone of these Amendments [the fifteenth, nineteenth, and twenty-fourth] has been violated by Ohio." *Id.* at 21 (Stewart, J. dissenting). Here just such a claim has been made and that claim is fully supported by the record and Alabama's history including that in this and other Courts.[29]

In Ohio men may be " . . . entirely free to assemble, speak, write, and proselytize as they see fit." *Id.* at 25. In Alabama that, unfortunately is not and has not been the case.[30]

The Chief Justice dissenting in *Williams* noted that:

. . . neither the American Independent Party nor the Socialist Labor Party made an effort to comply with

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[29] See cases cited notes 20 and 26, *supra*.

[30] For the history, in Alabama, of these rights is also studded with resort to the courts. See, *e.g.*, Thornhill v. Alabama, 310 U. S. 88 (1940) and Marsh v. Alabama, 326 U. S. 501 (1946); N. A. A. C. P. v. Alabama, 357 U. S. 449 (1958), 360 U. S. 240 (1959), 368 U. S. 16 (1961), 377 U. S. 288 (1964). *Cf.* New York Times Co. v. Sullivan, 376 U. S. 254 (1964).

> Ohio's election laws. Nor has either timely invoked the jurisdiction of the courts. That both had the opportunity to do so cannot be denied. *Id.* at 28 (Warren, C.J. dissenting) (and see the district court's opinion, 290 F. Supp. at 991).

But here plaintiffs moved with alacrity; it was not until the Secretary of State's September 10, 1968, refusal to certify the NDPA nominees that the situation was fully ripe for adjudication, suit was filed three days later (the "afterthought" issue—the Corrupt Practices Act—not being raised by defendants until September 17), and the first presentation to this Court was on October 12, 1968. And the case is still on an accelerated schedule.

In *Williams* the Chief Justice did:

> . . . not believe, however, as does Mr. Justice Stewart, that the Equal Protection Clause has only attenuated applicability to the system by which a State seeks to control the selection of Presidential electors. *Id.* at 31.

Here there are substantial equal protection questions at issue.[21]

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[21] Here, the statement of Mr. Justice White regarding the reasonableness of a primary of the type used in Ohio may not be applicable. In Alabama, there is no requirement of party registration; the previously white primary is open to all who desire to vote; thus Alabama is, in effect, a no-party state. Republicans, national Democrats, Wallacites (whether Alabama Democrats or prospective American Independent Party members), Negroes and others participate in the primary election as candidates and voters. No loyalty pledge is required of any of these voters; consequently the NDPA's Greene County candidates ran in the primary and attempted to run in the general election. *Cf.* in 1966 in Macon County where NDPA member Lucius Amerson was nominated in the Democratic primary election his white opponents refiled and

C. *The "Garrett Law" Violates Section 5 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments.*

1. The Voting Rights Act of 1965, § 5.

The Garrett Law established for Alabama a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964." Accordingly it clearly falls within the ambit of section 5, *supra*, 42 U. S. C. § 1973c.

The defendant Gallion, Alabama's "chief legal officer," *id.*, failed to submit the Garrett Law to the Attorney General of the United States and initiated no declaratory judgment proceedings regarding the statute.

The question here is less close than in *Sellers* v. *Trusell*, 253 F. Supp. 915, 918 (M. D. Ala. 1966) (three-judge court), *appeal dismissed*, 385 U. S. 19 (1966) where Circuit Judge Rives noted that "[t]he legislative history shows that the present language was meant to broaden the section [5, *supra*] and make it all-inclusive of any kind of practice." 253 F. Supp. at 918. The majority of the district court cited this case without discussion, apparently preferring to bottom its holding on a Mississippi three judge district court's contrary decisions in the three cases that were argued in this Court on October 15, 1968[32] (R. 557-58).

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ran against him successfully in the 1966 general election. Thus, in Alabama, without party registration the primary provides no ". . . opportunity for the presentation and winnowing down of candidates which is surely a legitimate objective of state policy." Williams v. Rhodes, *supra*, 89 S. Ct. at 26 (White, J. dissenting).

[32] Whitley v. Williams, No. 36 (1968 Term); Bunton v. Patterson, No. 26 (1968 Term); Fairley v. Patterson, No. 25 (1968 Term).

The Garrett Law, on its face, establishes a different "standard," a different "practice," and a different "procedure." The only question is "does it relate to voting?" The answer is found immediately in the definitional section, Section 14(c)(1), 42 U. S. C. 1973l(c)(1), which makes the term "voting" inclusive of "all action necessary to make a vote effective . . . ." See *United States* v. *Classic,* 313 U. S. 299, 318 (1941). The district court's opinion in *Socialist Labor Party* v. *Rhodes, supra,* recognized the inseparability of voting and candidacy in the constitutional context:

> The right to vote is the right to vote freely and without unreasonable prohibitions as to the candidate of one's choice.
>
> . . . The denial of this unfettered freedom of choice is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment. 290 F. Supp. at 987; see *id.* at 990.

That Negroes have historically been deprived of the right to vote is clear. That they are being prevented from running for office is equally clear. And, since without candidates it is quintessentially clear that there can be no election; no voting at all, the Garrett Law violates section 5. *Cf. Political Participation,* ch. 2, "Preventing Negroes from Becoming Candidates or Obtaining Office," 40-59.

2. The Fourteenth and Fifteenth Amendments and the Precepts of *Harman* v. *Forsennius*, 380 U. S. 528 (1968).

Harman v. *Forsennius* voided Virginia statutes requiring, as an alternative to payment of the poll tax, the filing of a certificate of residence six months in advance of an

election (*cf.* the Garrett Law's eight month filing deadline). It was said:

> Another objection to the poll tax raised in the congressional hearings was that the tax usually had to be paid long before the election—at a time when political campaigns were still quiescent—which tended to eliminate from the franchise a substantial number of voters who did not plan so far ahead. *Id.* at 539-40.
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> . . . .
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> This is plainly a cumbersome procedure. *Id.* at 541.
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> . . . .
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> In addition the certificate must be filed six months before the election, thus perpetuating one of the disenfranchising characteristics of the poll tax which the twenty-fourth amendment was designed to eliminate. *Id.* at 542.

In *Williams* v. *Rhodes, supra,* the Ohio law which required Garrett Law type action 272 days prior to the general election was declared unconstitutional at the request of George C. Wallace. But, in Alabama the Garrett Law which requires the filing of a declaration of intention 250 days before the general election was used to deny NDPA nominees, most of whom are Negroes, the right to run for elective office.

The defendant Secretary of State attempted to utilize an Alabama statute to deprive plaintiffs of their civil and political rights. In truth, to utilize a phrase but recently politically current, "there's not a dime's worth of difference between" the Alabama and Ohio statutes.

The Garrett Law has the additional infirmity of its being utilized as one of the instruments to deny Negroes the

right to run for public office. And, if applied to the plaintiffs it will deprive the voters of Alabama of the opportunity to vote for Negro candidates.

The majority below held that the law was not racially motivated; be this as it may there does appear to be truth in defendants' counsel's argument below that

> "if I were hunting the target, I would say that the target might have been those groups posing some substantial threat throughout the State of Alabama officeholderwise . . . " (R. 417).

Cf. the two major parties' attempt to monopolize Ohio politics in *Williams* v. *Rhodes;* but there has traditionally been only one major party in Alabama.

And, as Judge Johnson, dissenting here, said:

> Indeed, as the majority recites, it is generally accepted that the Garrett Law:
>
> "was intended to correct what the legislature viewed as an inequity against a party nominating by primary (presently only the Democratic Party), arising from the fact that parties nominating by other methods could hold back deciding upon candidates and selectively choose and place their candidates against the potential nominees by primary who appear most vulnerable."
>
> Protection of one political party from another political party is not a permissible object of legislation. Even if it be thought permissible, it would scarcely justify the adverse impact which this statute has on the right to an effective vote for the candidate of one's choice. Here, the process of choice of candidates is

cut off at an unreasonably early date. The candidates who seek relief from this Court find themselves in almost precisely the situation George C. Wallace found himself in by reason of an Ohio law that required a petition for nomination to state office (in this case, that of presidential elector) be filed at least 90 days before the primary election rather than the general election (R. 564-65).

D. *Plaintiffs Seasonably Complied with the Disputed Sections of the Corrupt Practices Act, Title 17 §§ 274-75 Code of Alabama (Recomp. 1958) and, Alternatively, Said Sections Are Unconstitutional and in Conflict with the Voting Rights Act of 1965 on Their Face and as Applied, Having Been Discriminatorily Invoked as an Afterthought With Intent to Disenfranchise.*

Judge Johnson's dissent discussing the State's " . . . first foray in the enforcement direction against a small, new and almost impecunious group of candidates . . . " (R. 564)

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[33] The factual details of compliance with these statutes are set forth *supra*, at pp. 9-10, 21-22 (see also R. 236-39, 246-50).

Compare the compliance of these "impecunious" and politically unsophisticated plaintiffs with the acts of some others. See, *e.g.*, "Nixon Fund Report Filed 9 Days After Deadline fixed under Law," New York Times, Nov. 5, 1968, at 30, cols. 1-2; "7 Fund Groups for Nixon File Late Data on Gifts," New York Times, Nov. 13, 1968, at 18, cols. 4-7; "4 More Nixon Groups File Fund Data," New York Times, Nov. 14, 1968, at 35, cols. 2-4; "Nixon-Agnew cols. 1-2; cost put at $17 million," Atlanta Journal, Nov. 15, 1968, at 14-A; "Nixon-After Deadline Report Raises Tally to $14.6 Million," Atlanta Journal, Nov. 25, 1968, at 2-C, cols. 1-3; Buchwald, "Devotion to Law and Order, Defense Fund for Fund-Raisers," Atlanta Journal, Nov. 29, 1968, at 23-A, cols. 1-3.

Sec. 274 compliance by other candidates was made in almost every instance on forms used for compliance with the Garrett Law. Thus, if the Garrett Law is declared unconstitutional on its face or in its application or is in violation of the Voting Rights Act of 1965, their compliance may also have been untimely as being too soon. Of course, the state would suffer no more injury by early than late filing.

should have disposed of defendant's last ditch attempt to "protect" the "2000 Democratic offices" (Cashin 217) from general election competition with Negro and liberal white candidates: the pertinent portion of this opinion is set forth *supra* at pp. 13-14, and at (R. 563-64).

1. By Disqualifying a Candidate Who Fails to File or Files Late the Name of a Finance Committee, Rather Than Pursuing Less Drastic Remedies, Alabama Deprives Both the Candidate and the Voters of Due Process.

Disqualification is an excessively harsh remedy and penalty. Assuming the state's legitimate interest is prohibiting transactions of the type envisaged by the Corrupt Practices Law, Tit. 17 §§ 268-86, Code of Alabama (Recomp. 1958), it still must take the "least drastic alternative" to achieve its lawful end. *Dean Milk Co.* v. *City of Madison,* 340 U. S. 349 (1951).

The principle operates even more particularly where fundamental human rights and freedoms are involved. See *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965) (particularly the concurring opinions, *Id.* at 497-99, 503-07); Struve, *The Less Restrictive Alternative Principle and Economic Due Process,* 80 *Harv. L. Rev.* 1463 (1967).[34] In regulating the right to vote, the state must, likewise, comply with the standard of "the least drastic alternative."

Cf. King v. *Smith,* 392 U. S. 309, 88 S. Ct. 2128 (1968), where, although the Court did not reach the constitutional

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[34] In fact, in Ratner, THE FUNCTION OF THE DUE PROCESS CLAUSE, 116 U. PA. L. REV. 1048, 1086 (1968), it is suggested that the "less intrusive alternative" principle comes into full play *only* where fundamental rights are involved.

issue, 88 S. Ct. at 2131, it did analyze the problem in terms of alternatives available to the state; and Alabama's blunderbuss approach was curtly dismissed.[35]

The rationale applies here. The right to seek public office and to a free choice of candidates for whom to vote are too precious to be defeated by a technical requirement when less drastic means serve the same purpose.

The unimportance to Alabama of the filing date seems as clear where the candidates are white as the date itself seems unclear where the candidates are black.[36] The annotations to Title 17 § 274, Code of Alabama provide:

> Candidate is entitled to have name placed on ballot where such candidate, within the time for qualifying, withdraws and requalifies, thus complying with the law in all respects, regardless of whether he had previously announced his candidacy and failed to comply with this section at that time. Rep. Atty. Gen., 1936-38, p. 575.

In *Jones* v. *Phillips*, 278 Ala. 354, 185 So. 2d 378 (1966), the court "reluctantly" held that Jones could not be placed on the ballot because of this section even though "[h]e did no more than overlook a mandatory rule which applied to his qualifying as a candidate .... He overlooked the filing of a necessary paper within the statutory period allowed, but this was no more 'corrupt' than a person who over-

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[35] As noted in the concurring opinion, the state was punishing the child for "the 'sin' of the mother." 88 S. Ct. at 2142.

[36] At least as to those candidates who filed the Garrett Law declarations, the Answer placed the state in the position of saying that the Corrupt Practices Act Statement was filed too soon (R. 278); that position illustrates the egregious particularity with which they are seeking to enforce the technical requirements of the election law against NDPA and its candidates.

looks the scheduled departure of a train or plane and thereby misses his trip or connection." 185 So. 2d at 381. The court also took this opportunity enthusiastically to endorse reliance on the "long-standing administrative interpretation . . . ." *Id.*

Nevertheless, in *Herndon* v. *Lee,* 281 Ala. 61, 199 So. 2d 74 (1967) the Reverend James E. Gilmore (now active in NDPA affairs) had in May 1966 filed a certificate of nomination as the candidate of the Greene County Freedom Organization for Sheriff but did not then file the Corrupt Practices Act appointment. About fifteen days later he orally informed the Probate Judge that he was not a nominee of that party. Then in September he refiled for the same office but not as a candidate of the Greene County Freedom Organization. This filing was accompanied by the Corrupt Practices Act appointment. Apparently because the notice of withdrawal was not in writing his May filing was held to be still in effect and he was denied a place on the ballot for failure to comply with § 274.

The state does have a legitimate interest in regulating the finances of political campaigns. But there are alternative means, such as civil penalties, which may achieve this end. To disqualify a candidate otherwise genuinely selected, when there is no showing that the candidate has, in fact, defrauded or is, in fact, at least intending to defraud, is wrong. The "least drastic alternative" was not taken.

2. Wholesale Effective Disenfranchisement of Voters for the Nonfeasance of Their Candidate Is Prohibited by the Voting Rights Act of 1965.

As already noted, *supra,* pp. 15, 17-18, 26-28, race and politics are inseparable in Alabama. See *Political Partici-*

pation, 48, 70-71, 101-04, 122, 144, 149, 155, 157, 159, 166. Denial of the opportunity to vote for NDPA nominees is inextricable from the state's racial problems and must be scrutinized with an eye to the Voting Rights Act of 1965, particularly §§ 2 (abridgement of the right to vote on account of race), and 4 (racially discriminatory devices or tests), 42 U. S. C. §§ 1973, 1973b. Since the state may not "deny or *abridge*," *id.* § 2 (emphasis added) the right, *a fortiori* these sections encompass the voter's simple civil right to have the names of candidates for whom to vote placed on the ballot. The attempt to apply the Alabama Corrupt Practices law against every one of the NDPA candidates (even though many had actually filed the statement) violated this right.[37] Particularly in cases with overtones of racial discrimination, it is necessary "... for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations." *Reitman* v. *Mulky*, 387 U. S. 369, 380 (1967).

The device of disqualification, if allowed, to succeed, would negate the voter's choice and frustrate their right to vote. This is the evil, the "test or device," at which the Voting Rights Act of 1965 was aimed.

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[37] Even the South Carolina Democratic Executive Committee has recognized the injustice of this procedure. A Negro candidate received a plurality in the Hampton County primary election "... but was disqualified from the run-off by the County Democratic Executive Committee because he failed to file a statement of campaign finances immediately after the election as required by party rules. [T]he State committee reinstated him as a run-off candidate, ruling that no one had been prejudiced by his failure to file a timely financial statement." POLITICAL PARTICIPATION, 136-37.

E. *Title 17 § 148 Code of Alabama Unconstitutionally Provides That "the Name of Each Candidate Shall Appear but One Time on Said Ballot, and Under Only One Emblem."* [38]

Prior to September 5, 1968, there were some doubts as to the legal status of the AIDP and its plans for the future. The NDPA desired to strengthen rather than dilute the vote of the nominees of the Democratic Party for President.

Upon inquiry as to whether the AIDP would be willing to allow that Party's nominees for Presidential Elector to also appear under the NDPA emblem, § 148, *id.*, was felt by the AIDP to bar such action. Were this section not operative, NDPA nominees for Presidential Elector would have been withdrawn and replaced by those of AIDP (R. 356). As it is, NDPA nominees for Presidential Elector, different from the AIDP nominees, appeared under the NDPA label.

Counsel have found no federal adjudications of the constitutionality of such a statute, but there are several state court cases. In *Murphy* v. *Curry,* 137 Cal. 479, 70 Pac. 461 (1902) a statute similar to § 148, *id.*, was declared unconstitutional. The California court said:

> It certainly must be true that a political party in convention assembled may nominate whomsoever it pleases for any office, provided that person have the proper legal qualifications. It is a drastic interference with the rights of such political parties to refuse any recognition to any of its nominees because, and only

[38] This provision has not been uniformly enforced. For example, plaintiff Robert P. Schwenn, Esq., of counsel here, has himself been twice on the same ballot (Schwenn 48-49).

because, some other political party has likewise seen fit to nominate him. . . . [i]f any confusion of political principles should thereby result, that is a matter wholly for the political parties themselves, and not at all for either the legislature or the courts. There can be no solid foundation in reason, therefore, for depriving one political party of the right to have placed upon its ballot the names of its nominees, *solely because some other political party has seen fit to select the same men*. . . .

Why, if it be the nominee's right to have the information conveyed to the voters, and if it be the state's duty to convey the information that he is the choice of one political party, should the law deprive him of the right to have the electors know that he is the choice of more than one party? The answer to this question will be found in what must have been the intent of the lawmakers,—to prevent the combination or fusion of two or more political parties by their selection in common of the same candidates. But until it is pointed out to us that such a combination or such a fusion is violative of the Constitution of the United States or of this State, or is against public policy, it must be held that the legislature herein has sought to exercise illegal control over political parties and their nominees, and in so doing has aimed an unwarranted blow at a vital principle of our republican government. *Id.*, 463-64.

Accord: *Hopper* v. *Britt*, 203 N. Y. 144, 96 N. E. 371 (1911); *Hopper* v. *Britt*, 204 N. Y. 524, 98 N. E. 86 (1912); *Callag-*

han v. *Voorhis*, 252 N. Y. 14, 168 N. E. 447 (1929).[39] We concede this is a minority view. See Annot. 78 A.L.R. 398.

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[39] The Liberal and Conservative Parties exist by virtue of these rulings in New York State. See Human Events, Dec. 28, 1968, "Rocky Knifing Conservatives," at 4, col. 2:

> Panicked by the growing strength of New York's Conservative party, the Albany front men for Nelson Rockefeller and Jacob Javits are readying legislation of dubious constitutionality designed to put the party out of business.
>
> Word was leaked last week that unnamed "political leaders" had drafted legislation that would prohibit a candidate from being nominated by more than one party—by the Republicans and the Conservatives, for instance, or by the Democratics and the Liberals.
>
> The New York *Times* noted that while the legislation would hurt both minor parties, it would hurt the Conservatives far more—since they have been gathering strength and the Liberals have been slipping.
>
> Liberal columnists Evans and Novak noted that the bill—designed to "squeeze the life out of the Conservative party"—was receiving crucial behind-the-scenes support from Gov. Rockefeller.
>
> Ironically, if Rocky's bill had been on the books in November, the Republicans would not have captured control of the State Assembly.
>
> The GOP eked out a 77-to-73 edge only because of the Conservatives. Five Republican assembly candidates running with Conservative endorsement unseated Democratic incumbents where the vote on the Conservative line represented the winning margin.
>
> Note: Rockefeller is pushing the bill despite the ruling of one top state official that it is unconstitutional. "Any bill that would inhibit a duly constituted political party from nominating a candidate of its choice, or would inhibit a candidate from accepting such a nomination, would, in my opinion, run afoul of the constitution," the official said. "I think the courts would be bound to strike it down."

F. *Failure to Place the Full Slate of NDPA Nominees on the Ballot Deprives Plaintiffs of the Right to Vote a Straight Ticket in Violation of the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and Article II, Section 1 (as Amended by the Twelfth Amendment), the Voting Rights Act of 1965, and Title 17, Sections 97, 157, Code of Alabama (Recomp. 1958), and Establishes the Applicatory Unconstitutionality of Id. § 148.*

1. The Voting Rights Act of 1965.

Section 4(c) of the Voting Rights Act of 1965, provides, in part:

> "[T]est or device" shall mean that any person as a prerequisite for voting . . . (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject . . . . Voting Rights Act of 1965, § 4(c), 42 U. S. C. § 1973b(c).

As has been amply demonstrated the Alabama ballot (Amos Pl. Exh. G) for the November 5, 1968, general election was a stiff test even for the literate voter;[40] the inclusion of AIDP Presidential Elector nominees "out there by themselves" (Cashin 218) was at the heart of the problem. And, from all appearances the arrangement was deliberately, not accidentally, confusing. See *supra* pp. 18-21.

2. Equal Protection.

The touchstone of the equal protection argument is that any abridgement of the right to vote, run for office, or par-

[40] Voters are limited to "five minutes in . . . the polling place . . . ." Title 17 §§176, 177 Code of Alabama (Recomp. 1958).

ticipate on an *equal* basis in the electoral process can only be justified upon a showing of necessity. "Our constitution leaves no room for classification of people that unnecessarily abridges that right." *Wesberry* v. *Sanders,* 376 U. S. 1, 18 (1964).

Equal protection guaranteed straight ticket voting in *Hopper* v. *Britt,* 203 N. Y. 144, 96 N. E. 371 (1911). There a statute denied straight ticket voting to parties which had not received more than 10,000 votes in the last election. The court, in an opinion which could well have served as the precursor of the Voting Rights Act of 1965, held that this arrangement violated the federal and state constitutions:

> . . . in our opinion the Constitution, by providing that certain officers shall be chosen by the electors, does guarantee that each voter shall have the same facilities as any other voter in expressing his will at the ballot-box, so far as practicable. . . . Some impediments to the exercise of the right to vote are . . . unavoidable, and when those impediments are dependent on circumstances and conditions not connected with the status of the candidates . . . they rarely affect the result of an election; the losses of one candidate being offset by those of the others. Not so with the impediments of the kind prescribed by this statute, which are directed solely at the character of the particular nominee for whom the vote is to be cast. . . . It does not tend to make voting easier for the elector, or to avoid confusion on his part, but has the contrary effect. . . . While the Constitution does not guarantee that the elector shall be allowed to express his vote by a single mark, our position is that he is guaranteed the right to express

his will by a single mark if other voters are given the right to express theirs by a single mark and there is no difficulty in according the right to all. It is said by the Supreme Court of Ohio in State v. Bode, 55 Ohio St. 224, 45 N. E. 195, 34 L. R. A. 498, 60 Am. St. Rep. 696, in upholding a law of this kind: "There is no discrimination against or in favor of any one; and, if any equality [*sic*] arises, it arises not from any inequality caused by the statute, but by reason of inequalities in the persons of the voters, and such inequalities are unavoidable. It is always much more difficult for some electors to cast their ballots than others. Distance, bad roads, means of transportation, bad health, and many other considerations may and do render it much more difficult for some men to cast their ballots than others. But these difficulties inhere in the men themselves, and not in the law. * * * The inconvenience is only that experienced by every one who votes other than a straight ticket." This argument ignores the distinction between difficulties or inconveniences occurring by nature or accident and inconvenience created by statute. Inequality in the facilities afforded the electors in casting their votes may defeat the will of the people as thoroughly as restrictions which the courts would hold to operate as a disenfranchisement of voters. . . . We therefore hold the statutory provisions challenged to be unconstitutional because they unnecessarily and substantially discriminate between electors in the opportunities and facilities afforded for voting for the candidates of their choice. If the discrimination were trivial, our decision would be different, but we know from the election litigations that have come before us that the discrimination here is of a very substantial

character, and, where voting machines are used, the difficulty of voting a split ticket is still greater than where voting is by ballot. 96 N. E. at 373-74.

3. Title 17 § 148 Code of Alabama (Recomp. 1958) Is Unconstitutional as Applied.

Regardless of what might be said for the conflicting views on the abstract constitutionality of a statute prohibiting multiple ballot appearances, an entirely separate problem arises with the application of *Id.* § 148 to the facts of this case. Were it not for the prohibition in the last sentence of this section, the problems of tests, devices, straight ticket voting, as complicated by the existence of AIDP, would, before the election, have been eliminated (R. 356). It is this section which, under the circumstances, effectively contravenes the Alabama statutory guarantee of straight ticket voting, *Id.* §§ 97, 157, and effectuates a "test or device" by requiring an understanding and a literacy test, and will disenfranchise thousands of voters for whose benefit the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965 exist.

G. *Code of Alabama, Title 17 § 125 Which in Effect Provides That Election Officials Will Come Only From the Two Major Parties Violates the Equal Protection Clause of the Fourteenth Amendment.*

Discrimination against any party's nominees violates the equal protection clause as to the voters, the candidates, and the party. Title 17 § 125 Code of Alabama (Recomp. 1958) allows "each political party or organization having made nominations . . . " to furnish a list from which

> an inspector and clerk shall be appointed for each voting place; provided, that where there are more than

> two lists filed, the appointments shall be made from the list presented by the two political parties having received the highest number of votes in the state in the next preceding regular election, if each of said parties present a list.

Where there are three or more parties, the discrimination is almost too clear for argument. See *e.g., Socialist Labor Party* v. *Rhodes, supra,* 290 F. Supp. at 987, 990.

The inspectors are the chief election officials. They are to: certify and post the election results, Title 17 § 128, Code of Alabama (Recomp. 1958), meet (with the clerks) at the polling place and open the polls and proclaim them open, §§ 131, 173, *Id.;* appoint a returning officer in the absence of the regular one, § 134 *Id.;* receive and utilize the list of all registered voters in the precinct, §§ 136-38 *Id.;* sign the certificate of election and deliver it to the returning officer, § 139 *Id.;* seal the poll list, § 140 *Id.;* receive challenges, § 143 *Id.;* be, with other officials, the only persons continuously permitted within thirty feet of the polling place, § 144 *Id.;* be in charge of matters relating to voting machines at the polls and instruct people in their use, §§ 102-107 *Id.;* handle, with the clerks, the absentee ballots, §§ 64 (25), 64(26), 64(30) *Id.;* hand out ballots, § 175 *Id.;* assist illiterate and handicapped voters in signing their names, § 175(1) *Id.;* challenge persons offering to vote, tender, read, and administer to them an oath, § 188 *Id.;* receive proof of identity and residence of challenged voters, § 189 *Id.;* reject persons challenged upon refusal to take the oath, § 190 *Id.;* inform such persons of the penalties of perjury before administering the oath, § 191 *Id.;* count the votes and determine validity of ballots, §§ 192, 193 *Id.;* and, with

other election officials, be responsible for delivering, tallying, sealing, etc. of the ballots, §§ 194, 194(1), 195 *Id.*[41] Also, and of particular importance, § 176 *Id.* provides:

> Any elector applying to vote who shall state to any of the inspectors that by reason of his inability to write the English language, or by reason of blindness or the loss of the use of his hand or hands, he is unable to prepare his ballot, may have the assistance of any person he may select. In such case said elector must remain within the polling place and the inspector shall send for the person selected; if the person can not be found, then any other person such elector may select. . . . No elector shall remain more than five minutes in, nor shall he be permitted to take his ballot from the polling place.

Thus, particularly in light of the five minute provision (also at § 177 *Id.*), assistance to illiterate and inexperienced voters is dependent upon the good faith and cooperation of the inspectors. This good faith and cooperation have not always been forthcoming, in Alabama and throughout the South. See *Political Participation* 71, 101-104, and see generally *Id.* at 60-114. See also, *infra, passim.*

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[41] The various sections cited in this paragraph, particularly those dealing with voter lists and challenges, set up a procedure that enables those with access to the lists and ballots to determine how any particular person voted. This is apparently the state's method for preserving information for deciding challenges and election contests; as such it is not challenged in this suit but the potential for abuse in Alabama's racial climate further underscores the need for checks and balances to protect all political groups.

II.

The Evidence of Defendant Herndon's Contempt of This Court's Orders of October 14 and 19, 1968, Is Clear. Consequently, the Vindication of Those Orders and the Integrity of the Judicial Process Require the Formulation and Enforcement of an Effective and Deterrent Remedy.

A. *The Legal Setting.*

Here, as in *United States* v. *Shipp*, 203 U. S. 563, 573 (1906) this Court, prior to noting probable jurisdiction "... had authority from the necessity of the case, to make orders preserving the existing conditions and the subject of the petition ...." Here, as in *Shipp*, a determination of the facts may call for remedial or, perhaps, criminal penalties.[42] *United States* v. *Shipp*, 214 U. S. 386 (1909); *United States* v. *Shipp*, 215 U. S. 580 (1909).

Even if the defendant's conduct were also a violation of the orders of the court below this would afford "no reason why it is not also a contempt of this court." *Merrimack River Savings Bank* v. *City of Clay Center*, 219 U. S. 527, 536 (1911).

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[42] See 1 THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDRICK POLLOCK 151-52 (M. D. Howe ed. 1941):

> I am up to my ears in work as usual; just now reading the evidence to see whether we shall punish some alleged murderers and connivers at murder for—contempt of court in so doing! A negro convicted of rape and sentenced to be hung had asked for a *habeas corpus* and had taken an appeal to our Court on the ground that his trial was a tragic farce. Whereupon he was taken out of jail and lynched. The State to which punishment of the murder belongs will do nothing but we had to take steps to deal with the contempt of our authority—which we have done, in your chancery's delightful phrase, with all deliberate speed.

Nor has this Court been able ". . . to attribute to Congress an intent to award favored treatment to a person who is contemptuous of two or three orders instead of only one." *United States* v. *Barnett*, 376 U. S. 681, 692 (1964). Regarding civil contempt there can be no doubt of this Court's power to cause compliance with its orders. See, *e.g.*, *Id.*, 376 U. S. at 753-54, 726 n. 6 (dissenting opinions of Goldberg and Black, J.J.).[43]

Evidence of defendant Herndon's contempt has been acquired in the District Court by plaintiffs and the United States.[44]

This procedure is comparable to that followed in *Shipp* which ". . . was a case of original jurisdiction in this Court, testimony . . . then taken before a commissioner, not a jury . . . [citations omitted]." *United States* v. *Barnett*, *supra*, 376 U.S. at 697-98.

And, in any event, this Court judicially knows matters contained in the Records of this case. See, *e.g.*, *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331 (1930); *United States* v. *Pink*, 315 U. S. 203, 216 (1942) and cases cited therein. *Cf. Trailmobile Co.* v. *Whiels*, 331 U. S. 40 (1947).

Since the defendant Herndon after presentation of a series of reasons for not placing the names of the NDPA

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[43] See also GOLDFARB, THE CONTEMPT POWER 175 (1963): "Interestingly, even Justice Black has found no fault with summary proceedings for civil contempts though he has suggested that all criminal contempts be tried by a jury."

[44] Motions to transmit the depositions taken there since the November 5, 1968, general election will be made. Those depositions are referred to herein by the name of the deponent. Additionally, affidavits of plaintiffs and other evidence have been procured and are being filed simultaneously with the filing of this brief and as an appendix hereto.

on the ballot seems to have lodged upon ignorance of this Court's orders or a lack of understanding and notice, a detailed and factual as well as historical summary seems necessary.

B. *The Factual Setting.*

1. Greene County, Alabama.

Eutaw, where defendant Herndon has his office is "a rural county seat town," the county's largest, with a population of approximately 2800, half of whom are Negroes (Herndon 13-14).

The courthouse is on a square which is "you could say, in the middle of the town." *Id.* The business district stretches ". . . in one direction, probably about three blocks, the other way about two blocks." *Id.* at 15.

The County's population of 13,600 in 1960 included 11,050 Negroes (81%). *Bureau of the Census (1960), Alabama* 2-63. Agriculture occupied 1697 of its 4033 employed persons. *Id.*, 2-204.

There are two employers larger than the county government: the Alabama Power Company Steam Plant and Bruce Products "when they are working" (Herndon 15-16).

The bulk of the county's population is poor and uneducated. Of 3120 employed males 932 earned less than $499 annually. *Bureau of the Census (1960), Alabama* 2-216. An income of less than $1000 was earned by 1148 of its 2807 families, the median income being $918 for males, $443 for females. *Id.*[45]

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[45] Alabama's Supreme Court judicially recognized the economic plight of the county, saying:

(footnote continued on next page)

The median education level of the county's Negro population is five years. *Id.* 2-222. The median number of school years completed is 5.8 years for men and boys and 7.2 for girls and women. *Id.* 2-198.

That the Voting Rights Act of 1965 might have been expected to have had an impact on Greene County, Alabama, is an understatement. This case results directly from its passage.

2. The Voting Rights Act of 1965, Alabama, and Greene County.

Eight Alabama counties, including Greene, were among the first designated for federal examiners listing eligible voters under Sections 7(a)-(d) of the Voting Rights Act of 1965. By 1968 four other Alabama counties had been added. Greene, Sumter and Marengo Counties, primary areas of NDPA success, have had Federal observers at every election since the May 3, 1966, Democratic Primary.[46]

The following chart illustrates the Act's effect on the registration of voters in Alabama, and in Greene County in particular.

For example, it was shown that many of the Negroes who would otherwise be eligible [for jury service] are moving away from the county because of the lack of economic opportunity existing in Greene County for them and for other young people. The members of the white and Negro races who would be of benefit to the community and whose loss is felt in the county leave and hence leave the community poorer for their loss. Coleman v. Alabama, 195 So. 2d 800, 802 (1967), *rev'd per curiam*, 389 U. S. 22 (1967).

[46] POLITICAL PARTICIPATION 212 (1968).

Registration and Percentage of Voting Age Population Registered[47]

Pre-Act (May 3, 1964)		
Nonwhite	92,737	(19.3%)
White	935,695	(69.2%)
Post-Act[48]		
Nonwhite	248,432	(51.6%)
White	1,212,317	(89.6%)
Greene County, Pre-Act		
Nonwhite	275	(5.5%)
White	2,305	(100+ %)
Greene County, Post-Act		
Nonwhite	3,953	(79 %)
White	2,057	(124.7%)

[47] *Id.*, 12-13, 222, 224-225. Figures compiled by the Voter Education Project of the Southern Regional Council, Inc. ("SRC") differ slightly. The SRC compilation as of August, 1968, is (from SRC files and published reports) as follows:

Registration and Percentage of Voting Age Population Registered.

Pre-Act		
Nonwhite	113,000	(23.5%)
White	no figure available	
Post-Act		
Nonwhite	273,000	(56.7%)
White	1,117,000	(82.5%)
Greene County, Pre-Act		
Nonwhite	542	(10.8%)
White	no figure available	
Greene County, Post-Act		
Nonwhite	3,988	(79.7%)
White	2,102	(127.4%)

[48] As of October 31, 1967, the race of 14,279 registered voters was unknown.

According to the Voter Education Project of the Southern Regional Council, Inc., of Alabama's 67 counties, 41 have more than 100% of the 1960 age-eligible white population registered to vote. Additionally, three counties have above a 99% white registration. Only 13 Alabama counties have less than 90% of their 1960 age-eligible white population registered to vote.[48]

According to the United States Commission on Civil Rights, Alabama has adopted differing strategies to minimize the effect of the Voting Rights Act of 1965.[50] They include diluting the Negro vote by switching to at-large elections,[51] and enacting discriminatory reapportionment and redistricting plans.[52]

In order to prevent Negroes from becoming candidates or obtaining office Alabama has extended the term of the incumbent white officials,[53] increased primary filing fees[54] and withheld information from prospective Negro candidates.[55]

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[49] One of the ". . . factors which are important in determining whether there is a need for Federal observers in a particular county . . . [is] [h]ave the registration rolls been properly purged of persons who have died, moved away, or otherwise become disqualified?" POLITICAL PARTICIPATION, 158 n. 29.

[50] See, regarding the Voting Rights Act of 1965 generally the Findings, Conclusion and Recommendations of the United States Commission on Civil Rights, in POLITICAL PARTICIPATION 171-91.

[51] *Id.* at 23-24.

[52] *Id.* at 26-30; *Simms* v. *Baggett*, 247 F. Supp. 96, 109 (M. D. Ala. 1965).

[53] POLITICAL PARTICIPATION 41-42; *Sellers* v. *Trussell*, 253 F. Supp. 915 (M. D. Ala. 1966), *appeal dismissed*, 385 U.S. 19 (1966).

[54] POLITICAL PARTICIPATION 43-44.

[55] *Id.* at 48-49.

Negro registrants have allegedly had their names omitted from voter lists,[56] been harassed by election officials,[57] and, if illiterate, refused assistance in voting.[58] Their ballots have been disqualified on technical grounds,[59] and racially segregated voting facilities have been used.[60]

In primary elections Alabama officials have allegedly excluded or interfered with Negro poll watchers[61] and allegedly participated in vote frauds.[62]

Additionally Alabama has participated in the discriminatory selection of election officials,[63] and, of course, economic intimidation and pressure have been applied.[64]

Although, in the judgment of many, "[i]t is in the interest of national and local political party organizations to bring these new Negro voters—many of whom are forming independent political organizations—into their own folds"[65] in Alabama this interest has not been generally

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[56] *Id.* at 65.

[57] *Id.* at 67-69.

[58] *Id.* at 70-72, citing Gilmore v. Greene County Democratic Executive Comm., 368 F.2d 328 and 370 F.2d 919 (5th Cir. 1966).

[59] POLITICAL PARTICIPATION, 76-78.

[60] *Id.* at 83-84.

[61] *Id.* at 87-89.

[62] *Id.* at 96-98; see Gilmore v. Greene County Democratic Executive Comm., *supra*, n. 3.

[63] POLITICAL PARTICIPATION, 99-104. See also Gilmore v. Greene County Democratic Executive Comm., *supra*, n. 3. In the 1968 general election, but fourteen of 120 were Negroes (Herndon 56, 69).

[64] POLITICAL PARTICIPATION, 122-125.

[65] Statement of Vice-Chairman Eugene Patterson, *Id.* at 191.

recognized.[66] Indeed, prior to 1966 the Alabama Democratic Party emblem appearing on ballots had been a crowing rooster with a scroll above it containing the legend "White Supremacy" and a scroll below it inscribed "For the Right." In 1966 the party changed its rules to substitute the word "Democrats" for "White Supremacy."[67]

As in other Black Belt areas since 1960 Greene County has undergone a revolution of party voting patterns. In 1960 Democratic Presidential Elector nominees received 753 votes, those pledged to Mr. Nixon received 381. By 1964 the Democrats received 589 votes, those pledged to Mr. Goldwater received 1124. *The World Almanac* 215 (1968). In 1968, NDPA Presidential Elector nominees received 2118 votes, those of the AIDP 111, those pledged to Mr. Wallace 1551, Mr. Nixon receiving but 178. Official Election Returns, 1968.

It is in this county and state that the defendant Herndon professes a general lack of knowledge of this court's orders regarding a local election.

3. The NDPA's Activity in the Black Belt.

Although the NDPA's nominees for Presidential Elector received but 54,144 votes compared with 142,435 for the nominees of the AIDP, they carried two counties (Greene and Sumter) over those pledged to the candidacy of George

[66] See *Id.* at 133-152, and *passim.*

[67] *Id.* at 149. In 1962 this emblem was attacked as part of an action brought by Negroes who had been deprived of the right to run for positions on the Jefferson County Democratic Executive Committee. The District Court temporarily restrained the holding of the 1962 Democratic Primary election and, after negotiation, the case was settled, Negroes being allowed to become candidates but the emblem's message then remaining. Billingsley v. Bailes, CA No. 10119 (N. D. Ala. filed March 20, 1962).

C. Wallace. The AIDP Presidential Elector slate carried Macon County.

NDPA Presidential Elector nominees ran ahead of those of the AIDP in 16 counties. The bulk of its strength lay in the Black Belt counties of Autauga, Barbour, Bibb, Bullock, Greene, Hale, Lowndes, Marengo, Montgomery, Perry, Pickens, Sumter, and Tuscaloosa, and in the North Alabama counties of Blount, Colbert, and Madison. The AIDP statewide margin was augmented by a 59,124 vote lead over the NDPA in Jefferson and Mobile Counties.

That the NDPA was not a cause of concern in Greene County is incredible. In adjoining Marengo County they elected five justices of the peace. In adjoining Sumter County they elected four justices of the peace, three constables and the Chairman of the Board of Education. In Greene County their county chairman, Rev. Peter J. Kirksey, had already been elected to the school board. Had their two nominees for the school board been elected three of its five members would have been members of the Negro race.

And, most importantly, had the names of their four nominees been on the ballot they would have been elected to the Greene County Commission. The one remaining white member of the county's governing body would have been the defendant James Dennis Herndon.

That they would have been elected seems certain.[68]

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[68] The highest vote received by any white candidate for Greene County local office was 1709. The NDPA attracted 1938 straight ticket ballots (Report to the Court by defendant Herndon's counsel). And, although 2036 straight ticket NDPA votes had been counted this 1938 figure excludes all ballots on which there was any cross-over, the NDPA not fielding candidates for all statewide and local positions.

Indeed, the NDPA's Negro candidate for Congress received 2209 Greene County votes and its white candidate for the Senate received 2,133 votes.

4. The Defendant Herndon and His Background.

Defendant Herndon is a graduate of the University of Alabama School of Law, admitted to practice in Alabama (Herndon 5).

Although he has no opinion as to whether or not he ". . . is The [emphasis in text] political figure in that County . . ." (*Id.* at 7), he is Greene County's Juvenile Judge and is responsible for will and estate cases, the recording of land mortgages and deeds, and the filing of contracts and instruments. He also serves as Chairman of the Greene County Commissioner's Court (the county governing body). He is responsible for maintaining the voting rolls, the filings of candidates for county office, the certification of their names and ordering ballots[69] (*Id.* at 6-11).

He is also a farmer (*Id.* at 19).

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[69] Among other duties of probate judges they are charged by law to:

> Cause to be delivered to each polling place alphabetical lists of those who have paid their poll tax and those who are registered to vote thereat (Title 17, §138, Code of Alabama (Recomp. 1958)); receive and preserve for a time, one copy of the certificate of results of an election (*Id.* §139); receive certification of nominations by political parties for state legislative offices as well as certification of those independent candidates properly nominated therefor by petitions of electors and to cause the names of such nominees to be printed upon the ballots utilized in his county (*Id.* §145); receive from candidates not accepting their nominations notification to that effect (*Id.* §148); preserve all certificates and petitions for nomination for six months after the election (*Id.* §168); cause the printing of voter instruction cards (*Id.* §165); cause ballots, blank poll lists, certificates of results, oaths, and all other stationery and blank forms necessary to conduct the

5. The Defendant Herndon's Experience in This and Other Racial Voting Cases.

There are but three practicing attorneys in Greene County, Alabama,[70] each of whom is a member of the white race and one of whom, Ralph R. Banks, Jr., serves as

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election to be printed and cause the foregoing to be properly distributed (*Id.* §186); assemble, with others, and make a correct statement of election results (*Id.* §199); receive the original public declaration of the results of an election of members of the house of representatives and to record same and provide certified copies thereof and to allow a copy thereof to be posted on the courthouse door (*Id.* §200); receive and forward to the secretary of state certificates setting forth the returns of election for members of the legislature (*Id.* §209); perform duties required for general elections in special elections (*Id.* §221); receive the names of members of a committee to receive, expend, audit and disburse campaign contributions (*Id.* §274) and receive from it detailed, itemized statements of expenditures made (*Id.* §278) with an affidavit of the candidate attached thereto (*Id.* §280); prepare and distribute ballots for the primary elections (*Id.* §§344, 366); furnish to the officers of a primary election supplies as well as envelopes (*Id.* §354); supply voters whose votes are challenged with certificates to the effect that such voters' names are on official voters lists (*Id.* §355); allow his office to be utilized as the proper place for receipt of ballot boxes by the county chairman of a political party (*Id.* §363); receive from the secretary of state lists of the nominees of the political parties (*Id.* §369); furnish certified copies of the registration lists to the parties to an election contest (*Id.* §377); receive notification of the results of election contests before the state executive committee of a political party (*Id.* §387); accept expense accounts of candidates for the legislature (*Id.* §400).

[70] MARTINDALE-HUBBELL LAW DIRECTORY 26 (1968). The lack of legal advice available to Negro candidates and voters in the Deep South presents a problem in the "... dissemination of information concerning the right to vote and the requirement of registration ... qualifying for office, the rights of candidates and voters, and the duties of election officials ...." POLITICAL PARTICIPATION 185-86.

county solicitor,[71] attorney for the county governing body and as an attorney in condemnation cases (Herndon 12-13).

Although he represented the county Mr. Banks was "retained" by the white candidates "to take care of me, represent me. . . . Well, to help keep these names off the ballot" (Owens 16).

Mr. Owens, incumbent white candidate for the Board of Education, talked with Mr. Banks "[s]ometime in September." "He told me that we would not have any opposition in November" (*Id.* at 10, 17).

The other white incumbent member of the Board of Education during ". . . the first part of September . . . ", " . . . stopped by . . . " Mr. Banks' office and asked if he'd have any opposition. " . . . [H]e didn't think I had anything to worry about" (Gould 11). He was not concerned about defendant Herndon allowing an opposition name to be placed on the ballot " . . . because Mr. Banks told me he thought I need not be concerned" (*Id.* at 17).

A white member of the County Commission for twenty-four years was told by Mr. Banks that he had no opposition "[t]wo or three times, sometime in September or first of October" (Carpenter 14).

A white incumbent County Commissioner of sixteen years' service was told by Mr. Banks that he'd have no opposition. He was told this in September (Drummond 12).

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[71] It is the duty of the county solicitor "[t]o prosecute and defend any civil action in the circuit court in the prosecution or defense of which the state is interested." Additionally he is "[t]o give *every* county official an opinion in writing on all matters connected with their respective offices . . . ." Title 13 §229, Code of Ala. (Recomp. 1958) (emphasis added).

Another white incumbent County Commissioner of eight years' service was also so advised. He too " . . . asked Mr. Banks, not the Judge," (Seale 7), as did another white candidate who was told in September " . . . I didn't have anything to worry about that is all. I just took it at that" (Henderson 13-14).

The Clerk of Court received the same information from Mr. Banks (Yarbrough 13, 14, 18), but William Earl Lee, the sheriff, simply knew nothing about the NDPA (Lee *passim*). But see the affidavit of William McKinley Branch in the Appendix at 18a-23a.

Sheriff Lee is the Lee of *Herndon* v. *Lee,* 281 Ala. 61, 199 So. 2d 74 (1967) (Lee 21-22).

Defendant Herndon is the Herndon of *Herndon* v. *Lee, supra.*

In *Herndon* v. *Lee, supra,* Mr. Banks represented Sheriff Lee. He now represents the white candidates, Sheriff Lee and the Circuit Clerk. On October 14, 1968—the day on which defendant Herndon received a copy of the District Court order dissolving the Temporary Restraining Order and this Court entered its first order and defendant Herndon wrote the printer telling him to delete the names of NDPA candidates from the ballot—Mr. Banks wrote defendant Herndon threatening suit, citing *Herndon* v. *Lee, supra,* feeling certain " . . . that such action will be considered by you as [*sic*] was in the Herndon v. Lee case and have no effect on our friendship. Sincerely, Ralph." For full text of the letter see Appendix pp. 37a-39a. See also Herndon 49-53; Gould 16-17).

On that day Commissioner Drummond attended the County Commission meeting and was told by defendant Herndon " . . . we didn't have any opposition, and I am

having to order the ballots to be printed today" (Gould 12, 18-20).

Thus, the facts of this case unfold as a not improbable sequel to earlier litigation.

While *Herndon* v. *Lee, supra,* was pending in Alabama's courts simultaneous litigation arising from the 1966 Greene County election was pending in federal courts. See *Gilmore* v. *Greene County Democratic Party Exec. Comm.,* Civ. No. 66-341 (N. D. Ala., filed May 27, 1966), *on interlocutory appeals,* 370 F. 2d 919, 368 F. 2d 329 (5th Cir. 1966); and *United States* v. *Executive Comm. of the Democratic Party of Greene County,* 254 F. Supp. 543 (N. D. Ala. 1966).

And, in the federal proceedings Mr. Banks, at that time suing defendant Herndon in state court, assisted in his federal representation.

Mr. Banks' name does not appear in the report of the federal cases. But he did enter an appearance on behalf of defendant Herndon in the deposition proceedings. ("I believe in the deposition he represented some of us" (Herndon 78. See also *id.* at 51-52, 77-80).) Defendant Herndon had been testifying regarding the procedure employed in assisting illiterate voters. The following transpired:

> Q. Did any person from the Solicitor's office concur in your instructions, that is, concur in your instructions to the voting officials?
>
> Mr. Hubbard: I am going to object to confidential communications between attorney and client.
>
> Mr. Wallace: I understand the person from the County Attorney's Office is Attorney for all officials?
>
> Mr. Banks: Under the public law I am an officer, a public officer of this County and a legal adviser.

Mr. Hubbard: He does appear of record as County Attorney and County Solicitor.

Mr. Wallace: I would appreciate it if Mr. Hubbard would make all objections of that type, and not be made by you. [sic]

Mr. Banks: I object to that.

Mr. Hubbard: I made the objection. The record will show it.

Mr. Wallace: It is hard for the reporter to keep track of who is talking.

The Witness: I think the reporter can handle this.

Mr. Wallace: Mr. Herndon, you are not taking the deposition?

Mr. Hubbard: Let me say this: Under the Federal Rules the witness has a right to object. Even though Mr. Banks may not appear as counsel in this case, if necessary I will place his name on record as counsel. I request the reporter to add as one of counsel for all defendants in this case Mr. Ralph Banks, of Eutaw, and under the Federal Rules either or both counsel are authorized to and may make objections at any time during the taking of these depositions.

Mr. Banks: I am admitted to practice in the Northern District.

Mr. Wallace: That is acceptable. Deposition of J. Dennis Herndon at 9-11, *Gilmore* v. *Greene County Democratic Party Exec. Comm.*, Civ. No. 66-341 (N. D. Ala., filed May 27, 1966).

In 1966, among other things, Greene County officials had determined that " . . . federal observers would not be permitted to observe the election inspectors assisting those

who were unable to cast their votes without such assistance." *United States* v. *Executive Comm. of the Democratic Party of Greene County*, 254 F. Supp. 543, 544 (N. D. Ala. 1966). In *Herndon* v. *Lee*, 281 Ala. 61, 199 So. 2d 74 (1967), the Rev. Mr. James E. Gilmore, a Negro, was denied a place on the ballot because of various technicalities in his filing of the Corrupt Practices Act Statement. The Fifth Circuit, on an interlocutory appeal, concluded "that the trial court erred in its determination that the certificate of nomination filed by the Freedom Party as to these two candidates [one of whom was Mr. Gilmore] was invalid." *Gilmore* v. *Greene County Democratic Party Executive Comm.*, 368 F. 2d 329 (5th Cir. 1966). The court stayed the general election.

Then, in *Gilmore* v. *Greene County Democratic Party Executive Comm.*, 370 F. 2d 919 (5th Cir. 1966), the Fifth Circuit denied a motion to recall its mandate issued pursuant to the foregoing opinion. The court also denied Mr. Gilmore's request to enjoin prosecution of *Herndon* v. *Lee*, *supra*, which had been ". . . commenced after our decision . . ." *Id.* at 920. It was noted that the plaintiffs were ". . . apprehensive lest that state court judgment, even though now appealed . . . to the Alabama Supreme Court, will, either through lack of adequate representation of their point of view or otherwise, be decided without full consideration of the position taken by [them]" *Id.*[12]

[12] Their apprehension was well-founded:

> A petition, asking that the submission be set aside, that petitioner be permitted to assign errors and file briefs, and for other relief, purporting to be filed in Gilmore's behalf, was presented to this court. The petition is signed, "Fred Wallace, Attorney for Petitioner." . . . We do not find the name, "Fred Wallace," on the role of attorneys who have been permitted to practice before this court. . . . Because the petition was not presented by an attorney authorized to represent litigants

The case is still pending in the Northern District of Alabama as Civil No. 66-341 (N. D. Ala., filed May 27, 1966).[73]

And Greene County bore the expense of *Herndon* v. *Lee*, *supra* (Herndon 56).

6. The Defendant Herndon Had Actual Knowledge of the Orders of This Court.

Defendant Herndon reads the newspapers (Herndon 45-47, 60-65, 70-76).

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before this court, the petition is due to be and is stricken. Herndon v. Lee, *supra*, 281 Ala. at 66.

(Fred Wallace appears as Gilmore's counsel in the two reported Fifth Circuit decisions.)

Thus, although the Fifth Circuit had been "... advised that ... [the Negroes were] parties to that pending state court suit and ... [were] thus entitled to be heard in the Alabama Supreme Court," 370 F. 2d at 920, that was not the case. For further elucidation regarding these proceedings where the Rev. Gilmore was finally represented see Gilmore v. Lee, 210 So. 2d 415 (Ala. 1968) where the Alabama Supreme Court held that if it had been "... correct on first appeal, an affirmance is correct now." *Id.* at 418.

[73] The judicial history of racial discrimination by Greene County public officials has not been limited to the right to vote and run for public office; racially discriminatory jury selection also has been found there on more than one occasion. See Coleman v. Alabama, 389 U. S. 22 (1967); Bokulich v. Jury Commission of Greene County, Civ. No. 66-562 (N. D. Ala. Sept. 19, 1968); *cf.* Coleman v. Alabama, 377 U. S. 129 (1964); Coleman v. Barton, No. 63-64 (N. D. Ala., June 10, 1964).

And *cf.* Kirkland v. Wallace, 4 Cr. L. 2151 (5th Cir., Oct. 22, 1968):

> Appellants, a group of civil rights workers, were arrested in 1966 while distributing boycott leaflets upon a public sidewalk in Eutaw, Alabama.
>
> ....
>
> Shortly thereafter, the charges were dismissed, with assurances that the arrests had been a "slip-up" .... *Id.*

Despite contentions of mootness, the court of appeals held the ordinance unconstitutional.

In this case that was quite an admission for:

1. Commissioner Drummond heard nothing about this lawsuit (Drummond 7), even though he subscribes to the Birmingham Post-Herald, and the Tuscaloosa News and the Greene County Democrat (*Id.* at 11).

2. Commissioner Carpenter subscribes to the "Birmingham News, Tuscaloosa News and I get a bunch of them; I don't get to read them" (Carpenter 13). Indeed, when he received a copy of the sample ballot upon which his name and the name of his NDPA opposition appeared he ". . . just dropped it in the trash can and didn't look to see . . . I get so much of that mail, it would have to be marked personal for me to look at it. I just throw" (*Id.* at 17).

3. Commissioner Seale subscribes to the Greene County Democrat and the "Tuscaloosa News, Sunday paper, Birmingham News. . . ." but read nothing about this case (Seale 13).

4. Commissioner Henderson subscribes to the Greene County Democrat which he "very seldom" reads, and the Tuscaloosa News which he "never" reads. Nor did he learn about this case from television (Henderson 7-10).

5. Board of Education member Owens subscribes to the Tuscaloosa News and the Greene County Democrat, has a television set and "heard something about" this litigation in September (Owens 7-8).

6. Board of Education member Gould reads ". . . the funnies, the stock market and the headlines sometimes" (Gould 9).

But several of them had heard "rumors" about the NDPA and its candidates (Seale 7; Owens 16; Drummond 8-10; Yarbrough 12), and Commissioner Seale saw his opponent, "[o]n Saturday before Tuesday, he was in town passing cards out. But that is all, just then two days before Election Day" (Seale 14).

Even the editor and publisher of the Greene County Democrat knew nothing of this Court's order, even though his own October 31, 1968, newspaper published an article relating that the NDPA ". . . is the party ordered on the Alabama ballot by the United States Supreme Court Saturday . . ." concluding that it also had ". . . a host of candidates for local offices." He had only read the first part of the article—*an article which he admitted he had printed* (Martin 15-16). He ". . . voted for the entire slate of George Wallace. Took me one second to make the mark and that was it" (*Id.* at 13-14).

Mr. Banks brought out the fact that Mr. Martin had neither read the article ": . . nor set the type in its entirety" (*Id.* at 23).

The undisputed evidence is:

a. Defendant Herndon is the only Alabama Judge of Probate who failed or refused to abide by this Court's orders (Bookout 10).

b. He knew of this appeal and the issuance of orders by this Court (Herndon 42, 47).

c. He made no inquiries—as he put it, "I didn't make any effort" (*Id.* at 75)—about the case other than to discuss it with Mr. Banks (*Id.* at 26-27, 48, 55, 67, 74-75).

d. He had absentee ballots printed with the names of the NDPA nominees for local office on them (*Id.* at 38).

e. He never advised the NDPA's local nominees of their removal from the ballot (*Id.* at 30), " . . . because they never asked" (*Id.* at 66).

f. The white and Negro local candidates filed the same documents with him, each of them filing Garrett Law Declarations, Corrupt Practices Act designations post-primary and post-general election statements (*Id.* at 58, 60), the white candidates' statements showing that they made no campaign expenditures for the general election. Two additional documents were filed by the Negro candidates:

1. a certificate of mass meeting and, 2. an additional Corrupt Practices Act designation filed by counsel.

g. He removed their names from the ballot due to an alleged failure to file the Corrupt Practices designation[74] (*Id.* at 41-42).

The following joint response (signed by counsel for defendant Herndon and by Mr. Banks as attorney for the

[74] In its Answer to the Complaint below the state relied on three grounds:—the holding of no mass meeting and failure to file a Garrett Law declaration as well as the corrupt practices filing failure now relied upon (R. 278, 285). Although defendant Herndon originally contended that no mass meeting had been held and no Garrett Law declarations had been filed (R. 307-08) he does not now place reliance on this. Defendant Herndon's original affidavits were procured by Mr. Banks (Herndon, 28-30, 31, 35, 67-68). But, so far as the defendant Herndon now knows there could have been a mass meeting (*Id.* at 35).

Greene County white candidates) filed in the District Court and the defendant Herndon's Response filed here show:

a. The original defendants included ". . . the Probate Judge of Autauga County, Alabama, as representative of the Judges of Probate of the State of Alabama."[75]

b. That on September 18, 1968, ". . .. each Judge of Probate of the State of Alabama was ordered to prepare or print ballots which included the nominees of the NDPA, and the use, display, or circulation of official ballots not including the names of the nominees of the NDPA was barred."

c. That the identity of the NDPA nominees covered by the District Court's order was known and absentee ballots with their names thereon were received by defendant Herndon on or about September 24, 1968.

d. The existence and dates of entry of this Court's orders of October 14 and 19, 1968, but the defendant ". . . further aver[s] that they did not learn of said actions of . . . [this Court] until after the General Election. . . ."

e. That defendant Herndon ordered the NDPA local candidates' names taken off the ballot on October 14, 1968. On that day, October 14, 1968, ". . . Defendant Herndon . . . determined that . . . [the NDPA local candidates] failed to comply with the provisions of Title 17, Sections 274 and 275, Code of Alabama (1958) and that by reason of such noncompliance, the Defendant Herndon . . . was

[75] The District Court held that "the plaintiffs properly bring this suit as a class action, and that the defendant Edward A. Grouby properly represents a class of defendants composed of the Judges of Probate of all counties in Alabama" (R. 539-40). Defendants did not contest that finding in this court.

prohibited from placing the names of such candidates on the ballot. . . ."

f. On or about October 17, 1968, the new ballots were received.

g. That defendant Herndon learned by newspaper account of the appeal to this court on or about October 15, 1968. He then averred:

1. He understood and believed this Court's orders applied only to NDPA's state and national candidates and he placed their names on the ballot.

2. ". . . [a]ll orders entered by this Honorable Court which applied to the Defendant Herndon were served upon him. . . ."

3. ". . . [T]he failure of any person to serve copies of the orders of . . . [this Court] further strengthened his understanding and belief that said orders did not apply to or affect his determination . . ." regarding NDPA's local candidates.

4. ". . . [H]e sincerely understood and believed that the said orders . . . had no application to him . . . and he did not learn that said orders did so apply to him . . ." until after the election.

5. He says he told NDPA Congressional candidate Branch and County Chairman and school board member Kirksey between October 14 and November 5, 1968, that the NDPA candidates' names would not be on the ballot. But see the affidavit of William McKinley Branch, appendix pp. 18a-23a.

6. He admits he gave out absentee ballots as sample ballots and told "all persons who asked" that

NDPA candidates would not be on the ballot; that a candidate's sample ballot in the local newspaper omitted NDPA names; and that neither he nor the other defendants knew NDPA candidates were campaigning.

7. That NDPA candidates carried the county wherever their names appeared on the ballot and that the highest number of votes received by any white candidates for local office was 1709.

8. That although the results of the election had been certified the white candidates have taken no oath of office and have not assumed the duties of office and the ballots and all other records have been and will be preserved.

C. *The Defendant Herndon, Himself a Lawyer, Was at All Times Represented by Counsel.*

In the District Court in response to the Government's allegations that "Herndon and/or attorneys representing him had knowledge of . . ." this Court's orders he denied that he had such knowledge or ". . . had any attorney representing them [him] or any of them in connection with . . . [these] proceeding[s] . . . and further den[ied] that any attorney representing them [him] or any of them had knowledge of said orders . . . ."

He also averred that the omission of NDPA candidates' names ". . . was the result of ignorance . . ." the white candidates then agreeing that an injunction issue against them in order to prevent their assumption of office.

It is undisputed that defendant Herndon was a member of the class of Judges of Probate represented by Judge

Grouby of Autauga County, named in the original complaint. *Cf. Reynolds* v. *Sims,* 377 U. S. 533 (1964) and *Lee* v. *Washington,* 390 U. S. 333 (1968), *aff'g* 263 F. Supp. 327 (M. D. Ala. 1966).

The Attorney General of Alabama is charged by law with representing the state's interest in "all litigation" concerning it "or any department thereof" ". . . and the employment of any attorneys for the purpose of representing the state or any department thereof shall be the attorney general . . . ." Title 55 § 244, Code of Alabama (Recomp. 1958). "The deputy attorney general shall have all the power and authority . . . conferred by law on the attorney general . . . ." *Id.,* § 231(1)(4).

"The attorney general shall give his opinion, or otherwise, as to any question of law connected with the duties of the . . . Probate Judge . . . ." *Id.,* § 240.

Matters referable to the Judges of Probate and ballot preparation arose in this court at oral argument. See, *e.g.,* the opinion of Mr. Justice Harlan, 89 S. Ct. at 229-30. In addition to the portions of the oral argument there quoted, counsel stated:

> I do make this observation to the Court. There were 67 other defendants in the case below. Every probate judge in the State of Alabama was made a defendant. The only people who were required to file with Mrs. Amos, the Secretary of State, at all were the candidates for state-wide office.

And, of course, compliance was not only not impossible in Greene County but, in fact, the county was in compliance

and the defendant Herndon on October 14, 1968, ordered the ballot changed.[76]

Not only was Judge Herndon represented before this court by counsel but Alabama's Deputy Attorney General John G. Bookout, a member of the Bar of this Court, represented all defendants otherwise unrepresented in the District Court (Bookout 3-4). When preparing their defense the state attorney general's office telephoned each of the involved judges of probate and procured from them all documents in their possession (*Id.* at 5).

Mr. Bookout was informed of the issuance of this Court's order by the Clerk " . . . on a Saturday during the Alabama-Tennessee football game which was on television" (*Id.* at 6) [October 19, 1968].

He " . . . didn't understand at that point what had been reinstated." He " . . . had to sit down later and think back in my mind about the sequence of events before . . . [I] understood what had happened" (*Id.* at 8).

Following that to the best of his knowledge the state attorney general's office [defendant Gallion's office] took no steps to inform any defendant of the action of this Court, and Mr. Bookout did not know whether or not any defendants inquired of their office (*Id.* at 9).

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[76] In Alabama

> . . . the name of no person shall be printed upon the ballots who may, not less than twenty days before the election, notify the Judge of Probate in writing . . . that he will not accept the nomination specified in the certificate of nomination or petition of electors. Title 17 § 148, Code of Ala. (Recomp. 1958).

Thus, Alabama ballots should not, in any event, have been printed prior to October 17, 1968, the date of their delivery back to defendant Herndon.

But notification from Mr. Bookout was not necessary for non-lawyer Mabel S. Amos, a defendant and Alabama's Secretary of State. She read of this Court's order in the newspaper and believes she received a call from the Attorney General's office about it. Following that she made no further certifications (Amos 6-7).

Mrs. Amos received a call when the District Court dissolved its Order (October 11, 1968). As she put it:

> And I was trying to reword something to rescind my order, and before I could ever get it reworded they reinstated it, so I didn't see any necessity of doing anything else. They were on there and they all appeared on the ballots. So there was not any reason to do anything further. *Id.* at 8.

But, "... The Probate Judges certifies [sic] the printers." *Id.* at 8.

Defendant Herndon had no such hesitancy.

He is an attorney and when he testified was advised of his rights. His deposition was taken in the presence of his present counsel with the understanding that it would be used in this Court (Herndon 4, 7-10).

Mr. Banks, the county solicitor and simultaneously the lawyer for the white candidates, ". . . was the one that called it [grounds for disqualification] to my attention that they had not met this requirement" (*Id.* at 28-30).

Defendant Herndon never communicated with the state's attorney general or requested an opinion from him (*Id.* at 44, 54-57). But he may have discussed these matters with Mr. Banks even though he insists he had no attorney (*Id.* at 48).

Lawyer and defendant Judge Herndon contends that he told Messrs. Branch and Kirksey that the NDPA candidates would not be on the ballot but never told the candidates themselves " . . . because they never asked" (*Id.* at 65). The Rev. Branch denies this in his affidavit, a copy of which is set forth in the Appendix at 18a. And defendant Herndon later stated that when the Rev. Kirksey " . . . asked me had I heard anything from the court" and he told him " . . . no," he " . . . was assuming he [Kirksey] had discussed the situation with Branch. I don't know that for a fact" (*Id.* at 66).

There were other reports immediately following the election. According to Dr. Cashin's affidavit, Exh. A to Plaintiffs' Motion to Show Cause, defendant Herndon stated:

> . . . in his opinion they did not qualify. I told him I had a copy of the Supreme Court order which required placing the candidates on the ballot. He again informed me that they did not legally qualify. I asked by whose authority this was done. He said "They are not on the ballot."

And, according to the Birmingham *News*, *Id.* Exhs. B and C he said:

> Don't ask me why this group didn't appeal. Maybe they didn't pay their lawyer; I don't know

and, none of them "said anything to me about running."

CONCLUSION AND PROPOSED REMEDY

The NDPA is a threat to the local, state, and Congressional candidates of the Alabama Democratic Party. The scheme of a two-headed elector slate requiring split ticket voting was designed to protect that party's more than 2000 local, state and national office-holders. That there are lambs among the wolves is not questioned. But although their "voice is Jacob's voice . . . the hands are the hands of Esau." *Genesis* 27:22.

In the environment of devices invented to delay effective Negro participation in Alabama politics Negroes were locked out of the State Democratic Party. Now that they have the right to vote the defendants are attempting to protect State office-holders by limiting the choice of Alabama's voters in the general election; the November 5, 1968, general election ballot was devised to lock NDPA out of the voting booth and to lock Negro voters into a political party still clearly committed to the doctrine of White Supremacy. The defendant state officials, Wallace-pledged nominees for Presidential Elector, local counterparts such as defendant Herndon have elaborated this "test or device."

AIDP, the "party within a party" (Amos, 89) worked one side of the street. The ADP worked the other. But the object was at all times to direct Negro voter traffic to ADP local, state and national nominees—candidates running on the ticket of George C. Wallace.

And where the NDPA constituted the gravest of threats, in Greene County, they adopted the simplest and crudest, if most effective subterfuge—they simply left the winners off the ballot.

As to the case in chief, plaintiffs contend that this Court should (a) declare the following sections of Title 17, Code

of Alabama (Recomp. 1958) unconstitutional on their face and as applied to plaintiffs: § 125 (insofar as it favors the two major parties in selection of election officials), § 145(3) (the Garrett Law), § 148 (last sentence—relating to number of ballot appearances—only), and §§ 274-75 (insofar as they would disqualify plaintiffs from running in the November 1968 general election); and (b) make permanent the temporary relief heretofore granted by declaring that the effect of that relief, when properly complied with, upon the November 5, 1968 general election is the correct application of the law to this case. As to Greene County and James Dennis Herndon the suggested remedy is that this Court should:

(a) Issue an order setting aside the results of the November 5, 1968, general election for the offices of Greene County Commissioner, Places 1 through 4, and Greene County Board of Education, Places 1 and 2, and requiring that a new election to fill the vacancies to be caused to occur thereby be held on a day certain (at the earliest practicable date); to be accomplished by an order to defendant Albert Brewer, Governor of Alabama, requiring that he cause a special election to be held for the foregoing offices as authorized by Title 17, Code of Alabama (Recomp. 1958) §§ 215, 217, the order by said Governor to include, as required by *Id.* § 217, a writ of election directed to the sheriff of Greene County this Court setting and he specifying therein the day on which such election is to be held, the cause and object of the same, and the names of the foregoing offices;

(b) Issue an order requiring defendant James Dennis Herndon to pay personally[11] as part of the costs of

[11] *Cf.* the order of the Fourth Circuit in Griffin v. County School Board of Prince Edward County, 363 F. 2d 206, 212 (1966)

this action, all expenses incident to the November 5, 1968, general election in Greene County, Alabama, and, additionally, all expenses of the special election to be held under said order as well as plaintiff's campaign expenses and all cost and other expenses incurred by and incident to this proceeding;

(c) In the event that additional factual matters are placed at issue and a determination thereof becomes necessary, to appoint a special master to hear testimony, receive evidence, and make findings of fact regarding such matters, if any;

(d) And, in any event, appoint a special master to supervise or conduct the following:

1. the special election required by this Court's order;

2. prior thereto the purging of the voter rolls of Greene County so that the names of persons who are deceased or non-resident are removed therefrom;[78]

3. the printing of ballots with appropriate emblems thereon in a manner which will permit straight ticket voting;

4. the appointment of election officials from lists provided by the NDPA and ADP county chairmen so that each party is equally represented at each polling place;

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requiring the contemptuous public officials personally ". . . to restore to the County Treasurer . . . through recapture or otherwise, an amount equal to the disbursements authorized and made . . ." and ordering a report on compliance to the court.

[78] *Cf.* the stipulation and portion of the opinion in Gray v. Main, CA. No. 2430-N (M. D. Ala. March 28, 1968) (slip opinion 49-52 and appendix thereto A9-A13) a copy of which is contained in the Appendix hereto at 40a.

5. the placement and work of federal observers at each polling place.

(e) Adjudge the defendant Herndon in civil contempt of the orders of this Court with the possibility of purging himself of such contempt only after doing each and every act and thing required by this Court's order such compliance to be reported by the special master appointed and, in the event of noncompliance by said defendant Herndon, then order that there be exacted from him a fine of $100 per day for each day he remains in default under said order.

(f) Determine whether the defendant Herndon was in criminal contempt of this Court and upon making such determination take such steps, if any, as are appropriate and proper under the circumstances.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions

CONSTITUTION OF THE UNITED STATES

ARTICLE I.

Sect. 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

APPENDIX

Sect. 3. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof for six years; and each Senator shall have one vote.

ARTICLE II.

Sect. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice President, chosen for the same term, be elected as follows:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress: but no Senator or

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Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. . . .

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XII

The electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the Presi-

dent, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIV

Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sect. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Amendment XV

Sect. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

Amendment XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. . . .

UNITED STATES CODE

TITLE 18

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

. . . .

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

TITLE 28

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

TITLE 42

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color. Pub. L. 89-110, § 2, Aug. 6, 1965, 79 Stat. 437.

§ 1973b. Suspension of the use of tests or devices in determining eligibility to vote—Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain juris-

diction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

DEFINITION OF TEST OR DEVICE

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State

or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub. L. 89–110, § 5, Aug. 6, 1965, 79 Stat. 439.

CODE OF ALABAMA (RECOMP. 1958)

TITLE 17

§ 125. Political parties furnish lists from which appointments are made.—Each political party or organization having made nominations may, by the chairman of its state or county executive committee or nominees for office, furnish the appointing board a list of not less than three names of qualified electors from each voting place, and from each of said lists an inspector and clerk shall be appointed for each voting place; provided, that where there are more than two lists filed, the appointments shall be made from the lists presented by the two political parties having received the highest number of votes in the state in the next preceding regular election, if each of said parties present a list.

§ 145(3). Name of candidate not to be certified or placed on ballot unless declaration of candidacy filed on or before March 1 of election year; exceptions.—(1) The secretary of state is hereby prohibited from certifying to the judges of probate of the several counties and such judges of probate are prohibited from causing to be printed on the ballots for a general election the name of any candidate for a state, district or federal office who does not file a declaration of intention to become a candidate for such office with the secretary of state on or before the first day of March of the year in which such general election is held. Such declaration shall include a statement designating the political party whose nomination for such office the person seeks; or if such person is not a candidate for nomination

by a political party, then such declaration shall state that such person will be an independent candidate for the office. Provided, however, this section shall not apply to the printing on the ballot of the names of persons nominated by political parties to fill vacancies in such parties' nominations for state, district or federal offices when the vacancy occurs after March first of the year in which a general election is held; and the name of every candidate nominated by a political party to fill any such vacancy shall be printed upon the ballot for the general election, if such name is duly certified by the party, within the time prescribed by law, as such party's nominee.

(2) The judges of probate of the several counties are hereby prohibited from causing to be printed on the ballots for any general election in their respective counties the names of any candidate in such election for a county office who does not file a declaration of intention to become a candidate for such office with him on or before the first day of March of the year in which such general election is held. Such declaration shall include a statement designating the political party whose nomination for such office the person seeks; or if such person is not a candidate for nomination by a political party, then such declaration shall state that such person will be an independent candidate for the office. Provided, however, this section shall not apply to the printing on the ballot of the names of persons nominated by political parties to fill vacancies in such parties' nominations for county offices when the vacancy occurs after March first of the year in which a general election is held; and the name of every candidate nominated by a political party to fill any such vacancy shall be printed upon the ballot for the general election, if such name is duly certified by the party, within the time prescribed by law, as such party's nominee.

(3) Qualification on or before the first day of March of an election year as a candidate for nomination in a primary election as a political party's candidate in the general election shall, for the purposes of enforcing this section be deemed a filing of a declaration of intention to be a candidate for such office in the general election within the meaning of such term as used in this section.

(4) The provisions of this section are supplemental. It shall be construed in pari materia with other laws regulating elections; however those laws or parts of laws which are in direct conflict or inconsistent herewith are hereby repealed. (1967, Ex. Sess., No. 243, appvd. May 11, 1967.) [Supp. 1967]

§ 148. Ballots; how printed.—The ballots printed in accordance with the provisions of this chapter shall contain the names of all candidates nominated by caucus, convention, mass meeting, primary election, or other assembly of any political party or faction, or by petition of electors and certified as provided in section 145 of this title, but the name of no person shall be printed upon the ballots who may, not less than twenty days before the election, notify the judge of probate in writing, acknowledged before an officer authorized by law to take acknowledgments, that he will not accept the nomination specified in the certificate of nomination or petition of electors. The name of each candidate shall appear but one time on said ballot, and under only one emblem. (1909, p. 277.)

§ 274. Committee to receive, expend, audit and disburse money or funds contributed.—Within five days after the announcement of his candidacy for any office, each candidate for a state office shall file with the secretary of

state, and each candidate for a county office or the state house of representatives shall file with the judge of probate of the county, and each candidate for a circuit or district office, including the state senate, shall file with the judge of probate of each county which is embodied in said circuit or district, a statement showing the name of not less than one nor more than five persons elected to receive, expend, audit, and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such persons to act as such committee, but any candidate, if he sees fit to do so, may declare himself as the person chosen for such purpose. If the statement required herein shall have been postmarked at any United States post office not later than midnight of the fifth day after the announcement of his candidacy, the candidate shall be deemed to have complied with the requirements of this section as to filing such statement within five days after the announcement of his candidacy. Such committee shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee; he shall keep detailed account of receipts, payments and liabilities. The said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed, or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. If any vacancies be created by death or resignation or any other cause on said committees, said candidate may fill such vacancies, or the remaining members shall discharge and complete the duties required of said committee as if such a vacancy had not been created. No candidate for nomination or election shall expend any

money directly or indirectly in aid of his nomination or election except by contributing to the committee designated by him as aforesaid. (1915, p. 250; 1959, p. 1036, appvd. Nov. 13, 1959.) [Supp. 1967]

§ 275. Candidate acting as own committee.—Any person who shall act as his own committee shall be governed by the provisions of this article relating to committees designated by candidates. Failure to make the declaration of appointment or selection by any candidate as herein required is declared to be a corrupt practice, and in addition the name of such candidate so failing shall not be allowed to go upon the ballot at such election. (1915, p. 250.)

Affidavit of Reber F. Boult, Jr.

(Caption omitted)

State of Georgia
County of Fulton

Reber F. Boult, Jr., after first being duly sworn deposes and says:

I am one of the attorneys for the plaintiffs in this action.

On October 25, 1968 I prepared a letter to the Judges of Probate of each county in the State of Alabama placing them on notice that the United States Supreme Court had ordered that the temporary relief originally decreed by the United States District Court for the Middle District of Alabama and served on them had been reinstated and continued in effect. A copy of this letter is attached hereto as Exhibit 1.

I am a member of the bar of the Supreme Court of Tennessee which court, by rule 38 of its Revised Rules, has adopted the *ABA Canons of Professional Ethics* as governing the conduct of the members of its bar. In order to obviate any possible question of the application of canon 9 (attached as Exhibit 2), before mailing the letter I telephoned L. Drew Redden, Esquire, Special Assistant Attorney General and counsel of record for defendants. I described the foregoing letter and advised him that, subject to his permission, I would mail it to each of the Judges of Probate. He replied that he did not believe that this would be necessary because it was his understanding that the Attorney General's office had already so notified the Judges, and he did not feel that he had authority to give me permission to communicate with them. After some dis-

cussion the conversation concluded with his assuring me that he would confirm with John G. Bookout, Deputy Attorney General and another counsel for defendants, whether the Judges of Probate had in fact been notified, and call me back. I in turn assured him that I would not mail the letter until hearing from him. He has not called back.

Not having heard from Mr. Redden or any other attorney for defendants, I have not mailed the letter.

Further deponent sayeth not.

REBER F. BOULT, JR.

(Sworn to December 31, 1968.)

EXHIBIT 1 TO AFFIDAVIT OF REBER F. BOULT, JR.

(Letterhead of The Roger Baldwin Foundation of ACLU, Inc., 5 Forsyth Street, NW, Atlanta, Georgia 30303)

CERTIFIED MAIL

October 25, 1968

To The Judges of Probate in the
State of Alabama

Gentlemen:

This is to confirm to you and place you upon notice that the temporary restraining order heretofore issued by the United States District Court of the Middle District of Alabama in the case of *Hadnott* v. *Amos* and mailed to you by certified mail by the clerk of that court on September 18, 1968, has been reinstated and continued in effect by the United States Supreme Court by its orders dated October 14 and October 19, 1968.

Accordingly, it is still required that the names of the nominees of The National Democratic Party of Alabama appear on the paper ballots and voting machines as required by that order and the schedules attached thereto.

Yours very truly,

/s/ R. F. BOULT, JR.
Reber F. Boult, Jr.

RFB:ng
cc: Clerk, United States Supreme Court
Clerk, United States District Court for the
Middle District of Alabama
Honorable MacDonald Gallion
Honorable L. Drew Redden

EXHIBIT 2 TO AFFIDAVIT OF REBER F. BOULT, JR.

ABA Canons of Professional Ethics

Canon 9

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

Affidavit of Rev. William McKinley Branch

(Caption omitted)

State of Georgia
County of Fulton

Rev. William McKinley Branch, after first being duly sworn deposes and says:

I am 47 years old, born, reared, and educated in Greene County; my address is Route 1, Box 130, Forkland, Alabama. I am married and have seven children, six of whom reside with me and my wife. My college education includes three years of liberal arts at Selma University, Selma, Alabama and four years leading to a degree of Bachelor of Science at Alabama State College, Montgomery, Alabama; I am presently taking a correspondence course which is designed to lead to an L.L.B. from LaSalle University, Chicago, Illinois.

I am pastor of the Ebenezer Baptist Church in Forkland and of the Christian Valley Baptist Church in Boligee, Alabama. I have been active in various civic and civil rights organizations in Greene County; I am now the president of the Greene County branch of the NAACP and of the Greene County Civic Organization (a political education group interested in economic development and upgrading the status of the underprivileged; I am sorry to say that this organization is all Negro), and president of the Alabama Economic Development Council (a state-wide organization devoted to raising the economic status of the underprivileged, Negro and white).

I taught junior high school in Greene County for about 15 years, leaving in about 1962, finding it necessary to resign because of my participation in civil rights activities.

My civil rights activities have involved me in litigation before. This includes having been made a defendant in the state courts in suits where an injunction was sought against me and others, it being alleged that we had kept children out of school for the purpose of being in peaceful civil rights demonstrations seeking the right to vote prior to adoption of the Voting Rights Act. Some of this litigation is still in progress. I have also been one of the plaintiffs in a case in the United States District Court for the Northern District of Alabama seeking to insure equal opportunities for jury service on the part of Negroes.

I was a candidate for Representative in Congress from the Fifth Congressional District of Alabama in the November 5, 1968 general election, placing second in a field of five. According to newspaper accounts I received between 28,000 and 30,000 votes. I carried Greene County. I campaigned actively throughout the district for the office, seeking votes from Negroes and white people. A copy of a leaflet used in my campaign is attached as an exhibit to this affidavit. I was also on the slate of presidential electors for The National Democratic Party of Alabama, pledged to the Humphrey-Muskie ticket, receiving 54,144 votes according to newspaper accounts.

This was the only time I have run for public office although I was active on behalf of various candidates in Greene County in the 1966 Democratic primary in which my wife was a candidate for tax collector. She made the run-off but was defeated. This was the first time I had been actively involved in politics although I have been a registered voter and voted for approximately the last fifteen years.

I am very familiar with the people and affairs of Greene County, having been very close to and worked with a great

number of the Negroes in the county and having gained considerable familiarity with the white elements of the county largely by observation and occasional contact. For example, I have since 1962 been actively seeking to have established a bi-racial committee to deal with problems in the county and have discussed the matter with the Sheriff, Judge of Probate, Circuit Judge, County Solicitor, and the Mayor of Eutaw. (All of the foregoing being persons who are now holding the offices.) Both alone and with committees chosen by the Greene County Civic Organization I have discussed this with them a number of times but have gotten only a negative response. In these discussions I have pointed out numerous examples of problems in the county which could have been avoided had there been such a committee.

Because of my thorough familiarity with the county I know the general attitudes and matters of community repute throughout Greene County, particularly on racial problems, the climate being generally hostile to the rights and economic development of Negroes. For example, the impression is widespread among Negroes in the county that if any Negro who is employed in the industries in the county goes to a political meeting he will lose his job.

It was, during the campaign for the November 5, 1968 general election, common knowledge throughout the county among both Negroes and white people that the six candidates of the National Democratic Party of Alabama were campaigning for election. It is my evaluation of the situation that the white people in Greene County were opposed to these candidacies, this being borne out by my analysis of the voting results in which neither I nor the NDPA slate of presidential elector nominees received any votes that were ascertainably white.

As it is actually exercised, the persons and organizations at the present time with power in public affairs in the county are the Board of County Commissioners, the Judge of Probate, the Sheriff, the Mayor of Eutaw, the County Solicitor, and Mr. McClean, Chairman of the County Board of Equalization, and to some extent the School Board.

Some of the difficulties that Negroes have experienced in the county are exemplified by the fact that various economic reprisals, particularly including eviction, have resulted from voter registration campaigns and Negro children attending previously all-white schools. Various organizations, including Negro churches, the Greene County Civic Organization, and the NAACP have taken various actions to assist those who have suffered these reprisals. These organizations have advised that redress should be sought through traditional channels, and in furtherance of this I have conferred several times with representatives of the United States Departments of Justice and Agriculture, which have had representatives investigating the problem; I am advised by these Departments that they are working on these matters at the present time although so far it has not produced tangible results.

The white candidates who ran for county office in the November 5, 1968 general election all campaigned extensively (as did the Negro candidates) in the May, 1966 [sic 1968] primary, handing and sending out letters and cards and going door to door. For the general election however so far as I personally know or know from reputation or from my knowledge of the community, they did not campaign at all in the general election although their opposition was the same. The candidates of the National Democratic Party of Alabama again campaigned extensively for the general election, handing out literature, making personal appear-

ances around the county, organizing and attending rallies, and appearing on radio.

Sometime during the week of September 23, I was in the office of Judge Herndon to secure a sample ballot and had a conversation in which I asked if he thought that the names of the NDPA local candidates would be on the ballot, to which he replied, in essence, "I don't think so." I was informed that no sample ballots were available at that time. I did at a later time, but not later than two weeks prior to the election, obtain a sample ballot from Judge Herndon in his office.

At no time prior to the November 5, 1968 general election was I informed either directly or indirectly that the local candidates of the NDPA would not appear on the ballot. My first knowledge of this was after I received my ballot to vote on election day, about 8:45 a.m.

A few days after the election I went to the Sheriff's office to ask him if he knew why the NDPA local candidates did not appear on the ballot. When I asked him this he replied that he did not know; Mr. Ralph Banks, county solicitor, was present at the time; he replied, in essence, "I wrote the judge [Herndon] a letter instructing him that if he did put the NDPA local candidates on the ballot he [Banks] would file suit against the judge for the state."

During this same conversation Sheriff Lee asked why we ran all black candidates, to which I replied that this would not be the case if we had the sort of bi-racial committee that was previously suggested. Sheriff Lee told me however that I was the one who had said that all of the Negro candidates should run; I observed that under the circumstances this was correct but I asked how he knew this, to which he replied that he had a man there with a tape recorder and that he could play it back any time he got ready. Mr. Banks said that they have somebody with a tape re-

corder at all of our meetings and that they know everything that we talk about. It was clearly understood that it was at least the Greene County Civic Organization that was being referred to.

The Greene County Civic Organization has a county-wide meeting every Monday night at the First Baptist Church in Eutaw, Alabama and committee meetings at least monthly at the Greene County Community Center House in Eutaw. These meetings are held regularly year round, including September, October, and November, 1968. The candidacies of the NDPA were extensively discussed at all of these meetings.

Further deponent sayeth not.

WILLIAM MCKINLEY BRANCH

(Sworn to December 24, 1968.)

(See opposite) ☞

William Branch's Accomplishments and Qualifications

1. Past President of the Greene County Education Association.

2. President and organizer of the Greene County Civic Organization.

3. President and organizer of the Greene County Democratic Conference.

4. President of the Alabama Rural Development Council.

5. Member of the Board of Directors of the Southern Rural Project.

6. President of the Alabama Farmers and Rural Development Council, Inc.

The National Democratic Party Of Alabama

VOTE FOR THE EAGLE AND SOCIAL AND ECONOMIC PROGRESS

●

Campaign Headquarters

2119 Broad Street

Tuscaloosa, Alabama 35401

Telephone 759-5459

Pd. Pol. Adv. by Joe Mellichamp

Wm McKinley Branch

for Congress

☆ *It's Time* ☆

to Change America

William Branch welcomed Robert Kennedy to Tuscaloosa last March. Some of the ideals shared by Kennedy and Branch have been listed in the platform below.

We Can Change America

WILLIAM BRANCH pledges to make democracy work for all Alabama's citizens. Specifically, William Branch believes...

1. THE PROGRAMS of the local, state and federal governments should be administered fairly, to all without regard to race, creed, color or national origin.

2. ALABAMA'S WATERWAYS and other natural resources should be developed fully in order to insure the greatest possible economic development for Alabama.

3. AN INCREASE in Unemployment and Workmen's Compensation is long overdue.

4. THE VOTING AGE should be lowered to 18 so our young people might renew their faith in the democratic process.

5. THE WAR in Viet Nam should be brought to a quick and lasting end.

6. WHITE AND BLACK people should begin to work together to solve their mutual problems, and should cast out the old prejudices which have divided our state and nation for so long.

7. WE SHOULD PROVIDE an increase in financial support for public schools and colleges in order to provide quality education for all children, regardless of race or economic condition.

8. LEGISLATION benefitting small farmers and farm cooperatives should be vigorously encouraged.

Background of William Branch

William Branch has lived in Alabama all his life and was educated in Alabama's public school system. Reverand Branch studied Liberal Arts and Theology for three years at Selma University and in 1956 he received his B.S. degree from Alabama State Teacher's College in Montgomery.

Reverand Branch taught history and government in the public school system for fifteen years. Branch is married and is the father of seven children.

At present Reverand Branch is the pastor of the Ebenezer and the Christian Valley Baptist Churches.

Affidavit of Frenchie Burton

(Caption omitted)

State of Georgia
County of Fulton

Frenchie Burton, after first being duly sworn deposes and says:

I live at Route 3, Box 70, Eutaw, Alabama; and I was a candidate for Board of County Commissioners, District 4 (in which district I live).

I am 64 years old, a semi-retired farmer (still farming some, raising cows, hogs, and corn). I am married and have two grown children, one of whom is living in Nebraska and the other in California. I was born and have always lived in Greene County. I am a member of the Greene County Civic Organization, church, and a masonic lodge.

My wife and I first registered to vote about 13 years ago, she being the first Negro woman to register to vote in Greene County. My campaign for the County Commission in the May 1968 primary was the first time I have been actively involved in politics.

I filed a declaration of my candidacy in February 1968 and, after the election (which I lost) during May I filed my statement of campaign contributions and expenses with the office of the Probate Judge.

I actively campaigned for this office prior to the November 1968 general election. I observed the white candidates for county office including my opponent, Herman Drummond, actively campaigning for the office for the May primary but I did not observe any campaigning by any of them for the November election.

Within thirty days after the general election I filed a statement of campaign income and expenses with the office of the Probate Judge.

I saw a sample ballot a day or two before the election which had my name on it. I was first informed that I was not on the ballot at the election about noon on election day.

I saw and conversed with my opponent several times during the campaign for the primary election but did not see him at all during the campaign for the general election. During these campaigns I handed out cards and attended rallies and meetings. The cards I handed out for my candidacy also had the names and the offices for which they were running of all of the other candidates of the National Democratic Party of Alabama who were running in Greene County. I would estimate that I handed out about 200 of these cards. The six Greene County candidates of the NDPA generally split the county up into areas and campaigned on each other's behalf in their respective areas.

Further the deponent sayeth not.

FRENCHIE BURTON

(Sworn to December 24, 1968.)

Affidavit of Vassie Knott

(Caption omitted)

State of Georgia
County of Fulton

Vassie Knott, being duly sworn deposes and says:

I am a member of the National Democratic Party of Alabama (NDPA) and ran on the NDPA ticket in the November 5, 1968 general election for the office of County Commissioner, Place No. 1, Greene County, Alabama.

I am 68 years old, married and have three grown girls who are now married and have families of their own. I reside at Route 1, Box 106, Boligee, Alabama. My education consists of completing the sixth grade.

Although I had helped Rev. Thomas E. Gilmore in his campaign for sheriff in 1966, running for County Commissioner was my first involvement in campaigning for political office. I filed the Declaration of Intention for this office in February 1968, and in May, after the primary, and again within 30 days after the general election, a statement of campaign contributions and expenses under the Corrupt Practices Act.

I campaigned for County Commissioner in the general election for approximately five weeks. I visited people, handed out cards, spoke at church meetings and asked people to vote for me. My opponent Mr. G. D. Seale campaigned during the primary but not in the general election.

During my campaign Mr. Peter Kirksey and Rev. William McKinley Branch told me that everything was all right and that the NDPA candidates were going to be on

the ballot. I campaigned thinking that I was going to be on the ballot. No one told me otherwise.

I was informed that I was not on the ballot on November 5th when neighbors told me that they had just gone to vote and that I was not on the ballot. I was altogether surprised as I was expecting to be on the ballot.

Further the deponent sayeth not.

VASSIE KNOTT

(Sworn to December 24, 1968.)

Affidavit of Harry C. Means

(Caption omitted)

State of Georgia
County of Fulton

Harry C. Means, being duly sworn, deposes and says:

I am a citizen of the State of Alabama and reside at Route 1, Box 21B, Boligee, Alabama. I was born May 17, 1924, am 44 years old, married and have four children, 1 boy and 3 girls, ages 16, 13, 12 and 2, all living with me and my wife. I attended Tuskegee Institute, Tuskegee, Alabama, for three years from 1946 to 1949.

I am a member of the National Democratic Party of Alabama (NDPA) and ran for the office of County Commissioner, Place No. 2, Greene County, Alabama on the NDPA ticket in the November 5, 1968 general election. I have filed the Declaration of Intention for this office in February 1968, and, in May after the primary, and again within 30 days after the general election, a statement of campaign contributions and expenses.

This was my first time running for political office. I had been previously appointed to the Loaning Committee of the Farmers Home Administration from 1963 until June 1968. In June 1968 I was appointed to the Wheat, Grain and Soybean Advisory Committee to the Secretary of Agriculture.

I campaigned for County Commissioner in the general election for approximately two months. During this period I went around throughout the county giving out cards and asking people to vote for me. I also attended church meetings, was introduced as running for County Commissioner

and was given an opportunity to explain why I thought I could do the job. My opponent Mr. J. E. Henderson was campaigning and handing out cards during the primary but did not do much campaigning during the general election. At times I wondered why he wasn't campaigning.

During my campaign I had been informed by Mr. Peter Kirksey and Rev. William McKinley Branch that the NDPA candidates were going to be on the ballot. I campaigned with the idea that I was going to be on the ballot. During my campaign no one informed me that either myself or any of the NDPA candidates would not be on the ballot. It was not until November 5, election day, that I found out from neighbors that I was not on the ballot. Not being on the ballot was a surprise and a great letdown to me. I was so sure we were going to be on the ballot. So many people promised they'd vote for me—I thought I was going to win.

Further the deponent sayeth not.

HARRY C. MEANS

(Sworn to December 24, 1968.)

Affidavit of Levi Morrow, Sr.

(Caption omitted)

State of Georgia
County of Fulton

Levi Morrow, Sr., after first being duly sworn, deposes and says:

I live at Route 3, Box 117, Eutaw, Alabama. I was a candidate of the National Democratic Party of Alabama for County Commissioner, District 3 (in which I live), Greene County, Alabama in the November 5, 1968 general election.

I am 65 years old, have lived in Greene County all of my life, am a farmer raising cattle and hogs, and am married with 12 children ranging in age from 21 to 41, all educated.

I have a sixth grade education from the schools of Greene County, Alabama.

I was first registered to vote 12 years ago but was not actively involved in a political campaign until my own campaign for this office in the May, 1968 Democratic primary.

I am a member of the Greene County Civic Organization, a church, a Masonic lodge, and a trustee of Carver High School.

In February, 1968 I filed a declaration of my intention to be a candidate for this position for the May Democratic primary. I filed this in February 1968 on a printed form provided me by the Probate Judge's office. I actively campaigned for this office in the primary but was defeated.

During May after the election I filed my statement of campaign contributions and expenses.

I attended the National Democratic Party of Alabama state convention in Birmingham in July 1968.

I again campaigned actively for the November 5, 1968 general election, handing out about 1,000 cards (a sample of the card handed out by me and the other NDPA Greene County candidates is attached as an exhibit), making appearances, and attending political rallies, the only substantial difference between this and my primary campaign being that this time I saw no point in asking white people for votes.

It was not until I went to vote on election day about 1 pm that I first heard that I and the other county candidates of the NDPA were not on the ballot. Nevertheless on December 2, 1968, I personally filed in the Probate Judge's office a statement of my campaign contributions and expenditures.

I am generally familiar with activities in Greene County and particularly Eutaw, which I go into once or twice a week. I have observed almost every time I have been in town that two or more of the following are in or about the Sheriff's Office often playing dominoes together: Mr. Homer Carpenter, a member of the Board of County Commissioners, my opponent in the elections, Sheriff William Lee, Mayor William Tuck, W. P. McClean of the Board of Equalization, and County Solicitor Ralph Banks. This observation includes September, October, and November, 1968. It therefore appears to me that these people play dominoes in the Sheriff's office every day.

I was furnished a sample election ballot (which included the Greene County NDPA candidates) which I was in-

formed was obtained from the Probate Judge's office about two weeks prior to the election.

I observed the white local candidates, including my opponent, campaigning extensively prior to the May primary but did not observe any campaigning on their part for the general election.

Further deponent sayeth not.

LEVI MORROW

(Sworn to December 24, 1968.)

EXHIBIT TO AFFIDAVIT OF LEVI MORROW, SR.

VOTE FOR THE FOLLOWING PERSONS

NOVEMBER 5, 1968

For U.S. Congress

REV. WILLIAM McKINLEY BRANCH

For Greene County Commissioners

HARRY MEANS **FRENCHIE BURTON**

LEVI MORROW **VASSIE KNOTT**

For Greene County School Board

ROBERT HINES **JAMES A. POSEY**

Paid Political Advertisement by the Greene County Civic Organization, Rev. P. J. Kirksey, Chairman

Letter Re Names on Ballots

RALPH R. BANKS, JR.
ATTORNEY AT LAW
EUTAW, ALABAMA

October 14, 1968

Honorable J. Dennis Herndon
Judge of the Probate Court of Greene County
Eutaw, Alabama

Dear Sir,

The following candidates:

G. D. Seale, J. E. Henderson, Herman Drummond, and Homer Carpenter, nominees of the Democratic Party for the four places on the Court of County Commissioners of Greene County, and

Hugh Q. Gould and Richard E. Owen, nominees of the Democratic Party for the two impending vacancies on the Greene County Board of Education,

in the General Election to be held November 5th, 1968, have retained me to represent and protect their interests as such nominees, and have authorized me to institute any legal proceedings I consider necessary in the premises.

A certificate was filed in your office on the 4th day of September, 1968, purporting to nominate Vassie Knolt [sic] to oppose Mr. Seale, Harry C. Means to oppose Mr. Henderson, Levi Morrow, Sr. to oppose Mr. Carpenter, Frenchie Burton to oppose Mr. Drummond, Robert Hines to oppose Mr. Gould, and James Posey to oppose Mr. Owens, as candidates of the National Democratic Party of Alabama, fol-

lowing a mass meeting allegedly held in Eutaw on the 7th day of May, 1968.

I wish to call to your attention that none of the persons nominated to oppose my clients filed a statement of intent with you to the effect that they intended to be candidates of the National Democratic Party of Alabama on or before the first day of March, 1968, as is required by Section 145(3) of Title 17, Code of Alabama, 1940, Recompiled 1958, 1967 Pocket Parts (Act 243 of the 1967 Extraordinary Session of the Alabama Legislature).

Nor did any of the opponents of my clients file in your office the name(s) of the person(s) designated by them to receive, disburse, and account for campaign funds required by Sections 274 and 275 of the Code of Alabama, 1940, Recompiled 1958, portions of what is commonly known as the Corrupt Practices Act.

Either of the above omissions disqualifies the National Democratic Party candidates from being placed on the ballot according to the decision of the three judge panel of the U. S. Court for the Middle District of Alabama rendered 11 October, 1968. Also the Corrupt Practices Act omission disqualifies them from being placed on the ballot under the Alabama Supreme Court decision of Herndon v. Lee (281 Ala. 61, 199 So. 2d 74) and Gilmore v. Lee (—— Ala. ——, 210 So. 2d 415), with which cases you and I are thoroughly familiar.

Please advise me as to your intentions concerning placing the National Democratic Party of Alabama candidates on the ballot for the November 5th General Election. In event you intend to place them on the ballot, it will be my duty to my clients to have the Circuit Court of Greene County, Alabama, in Equity, to enjoin you from doing so.

I feel certain that such action will be considered by you as was in the Herndon v. Lee case and have no effect on our friendship.

Sincerely,

/s/ Ralph Banks, Jr.
Ralph Banks, Jr.

Stipulation Acknowledged by Plaintiffs and Macon County Board of Registrars in Open Court

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 2430-N

FRED D. GRAY, *et al.*,
Plaintiffs,

—v.—

FRED D. MAIN, *et al.*,
Defendants,

UNITED STATES OF AMERICA,
Amicus Curiae.

It is agreed and stipulated by and between the plaintiffs and the defendant Board of Registrars of Macon County, Alabama, hereinafter sometimes called the Registrars, by and through their respective attorneys of record, as follows:

1. That the official voting list of qualified voters of Macon County as prepared and published by the Judge of Probate of Macon County, Alabama, for the primary elections of 1966 contained a number of names of persons thereon who are in law and fact not legally qualified voters of Macon County, Alabama, and should be removed from any voting lists containing their names.

2. That the Board of Registrars submitted a list of purgees to the Judge of Probate of Macon County, Alabama, in January of 1966, and that the names thereon, as well as other persons purged prior thereto by the Registrars, were not removed from the aforesaid official voting list through no fault, act or omission of the Registrars.

3. That in order to correct the list of qualified voters in Macon County and create a current valid list of such voters, it is agreed that the Court may enter substantially the following order or decree, to wit:

"DECREE"

"Under the evidence heard by the Court and the stipulation of the plaintiffs and the defendant, Macon County Board of Registrars, the Court is of the opinion and finds that the official list of qualified voters of Macon County, Alabama, as prepared and published by the Judge of Probate of Macon County for use in the 1966 primary elections contained numerous names of persons who are not legally qualified voters, and that a current valid list of voters should be prepared by the Registrars for official use by said Judge of Probate. Therefore, to accomplish such, it is hereby

"ORDERED, ADJUDGED AND DECREED as follows:

"1. That the Registrars shall forthwith begin a review of the latest 1966 list of qualified voters of Macon County (hereinafter called "the Voting List") by seeking to obtain current information from each person on said list and through the use of a "Voter Address Report" in the form set forth and attached as Exhibit "A" to this decree.

"2. That such Voter Address Report form, hereinafter called "the Form," be distributed to the persons named on said voting list by such methods as they deem appropriate and expeditious, including the aid of any responsible civic group or organization, or any responsible persons suggested by the plaintiffs and who will volunteer their services for such distribution; and that the Registrars give publicity, as a public service, by articles and announcements in the newspapers and over the radio stations in Macon County, Alabama, as to such voting list correction; and that with approval of the Macon County Board of Revenue the Registrars advertise its purpose to prepare a valid current list of qualified voters, showing in such advertisement the Voter Address Report form, Exhibit "A" hereto; that notices of the need for filing such form with the Registrars be posted on the County Courthouse Bulletin Board, in the office of the Board of Registrars and at each voting place in the County.

"3. That the following procedure shall be followed by the Registrars in compiling a valid current list of qualified voters as hereinafter ordered, to-wit:

a. A file will be set up showing, insofar as possible, all persons registered from 1902 to date.

b. A file will be set up showing, insofar as possible, all persons stricken from 1904 to date.

c. These files will be compared to determine names of all persons of whom there is a record of registration in the County and who have not been stricken.

d. All persons who turn in voter Address Report forms but of whom there is no record of registration will be noti-

fied and given an opportunity to produce proof of registration.

e. All persons who file such forms but fail to give complete information will be mailed a notice as to the information which they need to supply, and, if they still fail to respond, will then be mailed a request to appear before the Registrars so that they may be assisted in giving or obtaining complete information required by the forms.

f. After November 1, 1967, a notice shall be published in the Tuskegee News containing the names of all persons appearing on the 1966 list of qualified voters, who have failed to file such forms, or for whom there is no record of registration in the County; such notice to be a legal notice of intent to show cause why their names should not be stricken from the list of registered voters. A date for hearing, to be held not less than 30 nor more than 35 days after such notice, shall be set. Copies of such notice shall be posted at each polling place in the County, at one other location in each precinct or voting district, as the Registrar's office, and on the Courthouse Bulletin Board.

g. That in all respects the consideration of the legal right of persons to vote in Macon County shall be handled according to the laws of Alabama and that any person removed from the list of registered voters, if his whereabouts is known, shall be informed of this right to appeal any decision of the Registrars to the Circuit Court of Macon County.

h. That, following the completion of the work herein set out, and the determination of a valid list of the registered voters of Macon County, the Registrars shall pre-

pare in triplicate a copy showing the names of all registered voters as of the date of preparation, showing the full name, date of birth, race, sex, and precinct placement for voting, and it shall contain a signed statement to the effect that such list does contain the names of all persons on the registration list of the County, all other names having been duly and properly purged. One copy thereof to be filed with the Judge of Probate, one copy to be filed with this Court, and one copy to be retained in the office of the Registrars.

i. Such list shall henceforth be the list of registered voters of the County and no names shall henceforth be added to the list of registered voters except by registration.

j. All Voters Address Forms shall be retained for a period of one year after the completed valid list is filed as herein set out, and the list filed shall be retained as a public record by the Judge of Probate and the Registrars.

k. The plaintiffs shall have the right to inspect the records of the Registrars under the same conditions as public records are open to inspection, except that this shall not include inspection of registration applications for a period of one year from date.

l. That a list of all persons who are deleted or purged in accordance with this decree shall be prepared and furnished to this Court and another copy to the plaintiffs, showing the names, race, date of birth, sex and precinct.

Decree

This court concludes that in order to minimize friction and misunderstanding between the races, and to attempt to reduce suspicions of discriminatory practices by the defendants, it is necessary to enter the following order. It is therefore the ORDER, JUDGMENT, and DECREE of this court that the Board of Registrars of Macon County, Alabama, together with their agents, officers, successors, and all of those acting in concert or participation with them be, and the same are hereby ENJOINED from failing to act as herein set out which is in accordance with an agreement between the plaintiffs and said defendants as set out in the Appendix and it is incorporated herein as if set out *in haec verba*.

It is the further ORDER, JUDGMENT, and DECREE of the court that the defendants, Fred D. Main, etc., the Board of Registrars for Bullock County, Alabama, together with their agents, officers, successors, and all those acting in concert or participation with them, be and the same are hereby ENJOINED from failing to follow the procedures hereinafter set out with reference to the purging of voters and the changing of beat assignments of voters:

(1) The Board of Registrars is to maintain

(a) A book styled NOTICE TO PURGE, and the names of all persons proposed to be purged are to be entered in this book whether they are purged or not, and the notice to purge is to be published in the newspaper as required by Alabama law;

(b) A book entitled PURGE BOOK, and in this book is to be entered the names of those who are purged after the completion of the process as required by Alabama law; and

(c) A PRECINCT BOOK which includes the names of all registered voters, and whenever a name is entered in the book hereinabove styled "Purge Book" as referred to above (b), that name is to be struck through in the "Precinct Book" herein styled in (c). The names entered in the "Purge Book" herein set out in (b), are to tally with the names struck through in the "Precinct Book" herein set out in (c).

(2) The Board of Registrars is to immediately complete the initiation of the above procedure, and at the earliest time thereafter, as provided by Alabama law, is to furnish in writing a Voter Registration List to the Probate Judge, and thereafter all newly registered voters are to be furnished the Probate Judge in writing. The Board of Registrars is to retain written copies of each list furnished to the Probate Judge together with the date of delivery to said judge. The Probate Judge is *NOT* to add any name to the Voter Registration List in his care and custody except it be submitted as herein described.

(3) (a) The Probate Judge is not to change the beat assignment of any registered voter except upon a written direction in accordance with the name and change as provided in writing by the Board of Registrars.

(b) The Board of Registrars is to retain a copy of the written change with the date of the delivery of said change to the Probate Judge.

It is further the ORDER, JUDGMENT, and DECREE of the court that the defendants, Fred D. Main, Probate Judge, together with his agents, officers, successors, and all those acting in concert or participation with him, be and they are ENJOINED from failing to do the following:

In all elections hereafter the election officials are to be instructed:

(1) That the rest room facilities at Beat 3 are NOT to be closed completely, and that whatever use is permitted, is to be available to all persons without regard to race or color; and

(2) Poll watchers are to be permitted the use of writing materials, i.e., pen, pencil, paper, etc., without restraint; and

(3) (a) The election officials at voting machines are to follow Title 17, Section 107, Code of Alabama 1940, without discrimination as to race which states that an illiterate voter ". . . may request assistance of two inspectors of his choice or some other person of his choice who has not previously so acted for any other person during the election. . . ."

(b) Where paper ballots are used the election officials are to follow Title 17, Section 176, Code of Alabama 1940, without discrimination as to race which provides that a person unable to prepare his ballot because of inability to write the English language "may have the assistance of any person he may select."

It is the further ORDER, JUDGMENT, and DECREE of this court that all other relief requested by the plaintiffs be and the same is hereby DENIED. Costs in this matter are to be taxed equally, one half against the plaintiffs and one half against the defendants for which execution may issue.

DONE, this the 28 day of March, 1968.

VIRGIL PETERSON
United States District Judge

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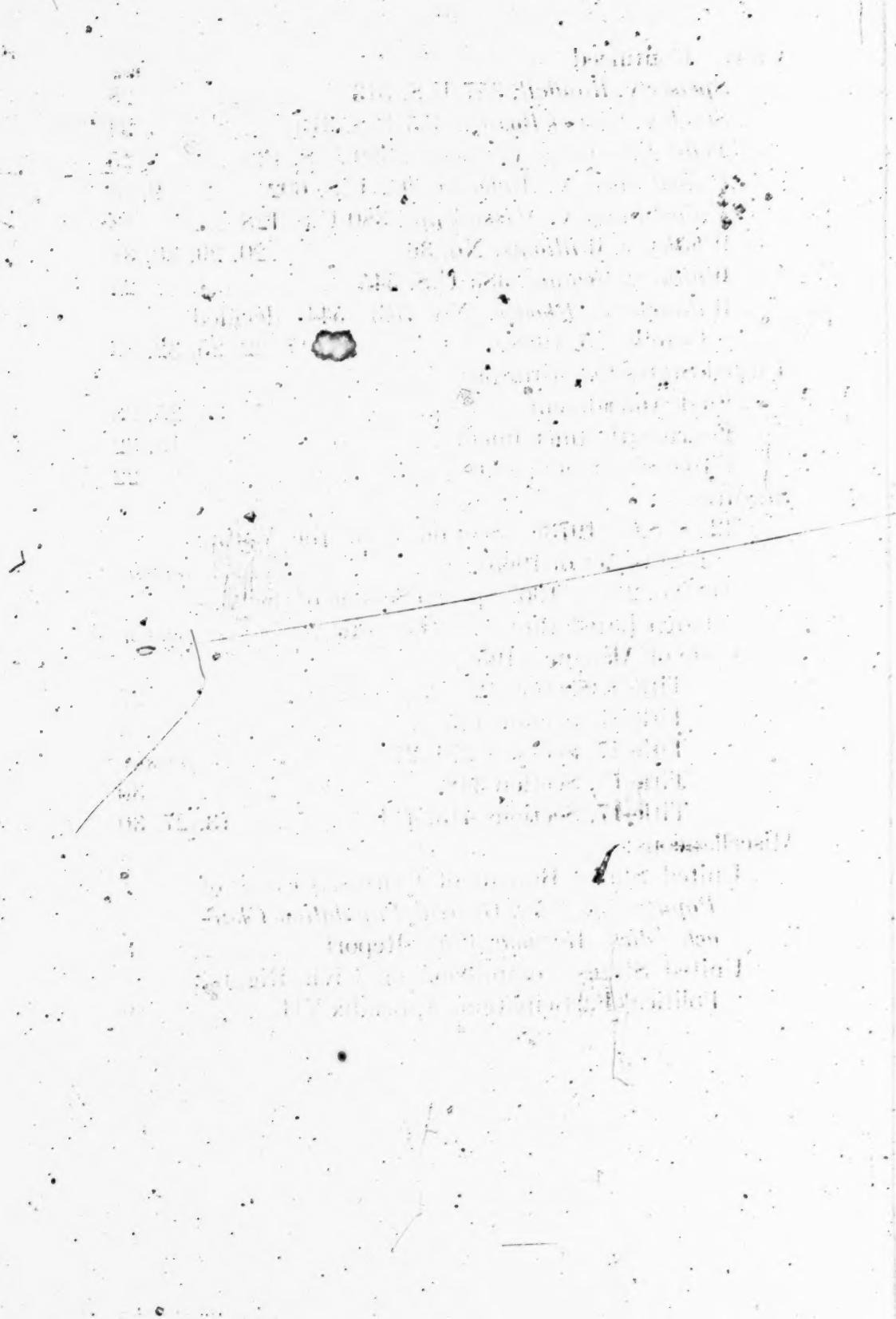

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 647

SALLIE M. HADNOTT, ET AL., APPELLANTS

v.

MABEL S. AMOS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The majority and dissenting opinions of the three-judge district court (J.S. App. 1a–29a) are reported at 291 F. Supp. 309.

JURISDICTION

The decree of the district court (J.S. App. 30a–32a) was entered on October 11, 1968. A notice of appeal to this Court was filed on October 11, 1968. The Jurisdictional Statement was filed on October 14, 1968, and probable jurisdiction was noted on December 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, the relevant provisions of the Alabama Corrupt Practices Act (Sections 274 and 275 of Title 17 of the Alabama Code (1958)), and the Garrett Act (Act No. 243, of 1967 Special Session of the Alabama Legislature), are reprinted in Appendix A, *infra*, pp. 1a–5a.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the disqualification of independent candidates for office in Alabama for failure to designate a finance committee within five days of the announcement of their candidacies was constitutional.

2. Whether the Probate Judge of Greene County validly disqualified independent candidates for local office on the ground that they had not been nominated by mass meeting when he gave no notice of the disqualification or opportunity to challenge it.

3. Whether a 1967 Alabama statute requiring all candidates for elective office to declare, before March 1, the offices for which they intend to run and the party whose nomination they seek, was unenforceable because not approved pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

STATEMENT

1. This suit, instituted on September 13, 1968, in the United States District Court for the Middle District of Alabama, was brought as a class action by the National Democratic Party of Alabama ("NDPA")

and some of its officers and candidates in the 1968 general election, predominantly Negroes,[1] against officials of the State of Alabama, including the Governor, Attorney General and Secretary of State, together with the probate judge of Autauga County (as representative of all the State's probate judges). The complaint (App. B, *infra*, pp. 6a–36a) alleged that the NDPA had, pursuant to State law, nominated candidates for various county and state-wide offices in Alabama and had submitted the names of these nominees for certification to the Secretary of State and for inclusion on appropriate ballots to the State's probate judges (who have the responsibility, under Alabama law, of preparing ballots to be used in each of the State's counties), but that the Secretary of State and the probate judges had refused to certify and place the names of these nominees on the ballot, in violation of the Constitution and federal law.

Since the complaint sought an injunction against the enforcement of various State statutes on federal constitutional grounds, a three-judge court was impaneled pursuant to 28 U.S.C. 2281. On September 16, 1968, the court held a hearing on appellants' motion for a temporary restraining order. At that time counsel for appellees stated to the court that the reasons for the Secretary of State's disqualification of the

[1] At least 60 of the 67 candidates for county or local office who ultimately ran under the NDPA label were Negroes. Each of 17 elected (in Etowah, Marengo and Sumter Counties) is a Negro, as are the 6 NDPA candidates in Greene County, who apparently would have prevailed had their names appeared on the ballot.

NDPA were (1) that the NDPA had failed to conduct a mass meeting at Huntsville, Alabama, on May 7, (a conclusion which the court below found insufficiently based) and (2) that the candidates had failed to comply with the "Garrett Act," a statute enacted at a Special Session of the Alabama Legislature in 1967 which requires every candidate for election to file by March 1 a declaration of intention to be a candidate, naming the political party with whose nomination he intends to run (App. A, *infra*, pp. 3a–5a); nothing had yet been alleged about non-compliance with the provision of the Corrupt Practices Act requiring designation of a financial committee (Ala. Code (1958), Tit. 17, § 274, App. A, *infra*, p. 2a). See J.S. App. 8a, 21a. Questions were also raised as to the willingness of certain NDPA nominees to run. In light of the new issues, the court offered both parties an opportunity to submit lists of the qualified and willing candidates. In response to this invitation, appellees alleged for the first time on September 17 that all the NDPA candidates were disqualified because they had failed to submit Corrupt Practices Act designations of committees to receive and disburse funds "within 5 days after certificates of the mass meetings of May 7, 1968, were filed in the Probate Offices and with the Secretary of State" (Defendants' letter to the district court dated September 17, 1968).

On September 18, the district court entered a temporary restraining order (Appendix C, *infra*, pp. 37a–45a), enjoining the named defendants and all the State's probate judges from preparing, distributing

or using any ballots which did not include the names of the NDPA candidates listed on two schedules attached to the order. Schedule 1 listed the NDPA candidates for United States Senator, eight seats in the United States House of Representatives, ten places as Presidential Electors, and for two State offices—President of the Public Service Commission and Representative in the Alabama House of Representatives from Madison County, District 3, Place No. 2. Schedule 2 listed 67 candidates for local offices in the following counties: Autauga (3), Colbert (4), Cullman (1), Dallas (2), Etowah (11), Greene (6), Jefferson (2), Lauderdale (2), Limestone (1), Madison (1), Marengo (6), Montgomery (2), Morgan (2), St. Clair (3), Sumter (12), Tuscaloosa (9), Wilcox (1).

On September 25, 1968, appellees filed their Answer (Appendix D, *infra,* pp. 46a–59a). After challenging the jurisdiction of the court and the standing of the plaintiffs and entering a general denial, appellees alleged that all the nominees on Schedule 1 were disqualified because they had failed to file the designation required by the Alabama Corrupt Practices Act. The Answer further alleged that certain named nominees on Schedule 1 were also disqualified (1) for failure to comply with the Garrett Act (2) because they were nominated for different numbered places on the ballot than was stated in their declarations of intention, and (3) because they were nominated for two positions on the ballot in violation of an Alabama statute. With respect to the local and county candidates on Schedule 2, the Answer alleged that either all or certain

named nominees in Autauga, Colbert, Cullman, Dallas, Etowah, Greene, Jefferson, Lauderdale, Limestone, Montgomery, Morgan and St. Clair counties were ineligible for one or more of the reasons specified with respect to nominees listed on Schedule 1. No specific allegation was made, in this regard, with reference to the candidates for local office in Marengo, Sumter, Tuscaloosa and Wilcox counties. Appellees did, however, allege in conclusion that none of the county and local nominees had filed designations under the Corrupt Practices Act "within five days from their meeting" (¶ 12, App. D, *infra*, p. 58a).

A hearing on the merits was held on September 30; the principal issues contested at that time were the constitutionality of the Garrett Act, the Corrupt Practices Act and the Secretary of State's conduct in determining that no mass meeting had been held on May 7. On October 11, by a two-to-one vote, the court dissolved the temporary restraining order and entered a judgment sustaining the constitutionality of all the challenged statutes—on their face and as applied—but enjoining the defendants from disqualifying any NDPA candidate for the alleged failure to conduct a mass meeting in Huntsville on May 7 (J.S. App. 30a–32a). Judge Johnson dissented (J.S. App. 25a–29a), concluding that the Corrupt Practice Act had been unconstitutionally administered because it was, for the first time, invoked by the Secretary *sua sponte*,[2] and that the Garrett Act violated the Equal

[2] The majority held that the claim of selective enforcement was "not proved" (J.S. App. 11a).

Protection Clause because the date prescribed for a declaration of intention of candidacy was "unreasonably early" (J.S. App. 27a) and was designed to protect the established political parties against independent challenges.[3]

Plaintiffs promptly appealed here. On October 14 and on October 19, 1968, this Court restored the district court's temporary restraining order of September 18 pending action on the Jurisdictional Statement. In compliance with these orders, the NDPA candidates appeared on all ballots in Alabama with the exception of the nominees for local office in Greene County. On November 5, NDPA nominees were elected to Justice of the Peace positions in Etowah (4), Marengo (5) and Sumter (4) Counties, and in Sumter County three NDPA candidates won seats as Constables and one was elected Chairman of the Board of Education. In Greene County, the NDPA candidates for local office were left off the ballot, except for absentee voters (see App. K, *infra*, pp. 78a–79a). But, it appears all—four candidates for County Commissioner and two for the Board of Education—would have won if their names had been listed.[4]

[3] Judge Johnson relied on the opinion of the three-judge District Court for the Southern District of Ohio, affirmed by this Court in *Williams* v. *Rhodes*, No. 543, this Term, October 15, 1968.

[4] In response to an order of the district court issued on December 17, 1968 (App. H, *infra*, pp. 72a–73a), the Probate

On November 15, appellants filed in this Court a "Motion for Order to Show Cause as to Why James Dennis Herndon, Judge of Probate, Greene County, Alabama, Should Not Be Held in Contempt of this Court and to Set Aside the Results of the Election in Said County and Cause New Elections to Be Held Therein." Thereafter, on November 21, upon motions submitted by the United States, the district court required appellants to show cause why the results of the November 5 election should not be enjoined with respect to the local offices in Greene County. See *Memorandum for the United States* filed in this Court on November 25, 1968, pp. 13–19. On December 20, the district court entered an order staying the effect of the recent election in Greene County (App. J., *infra,* pp. 75a–77a).

2. The relevant background of these proceedings is familiar history. Throughout most of the century preceding 1965 the Negro in Alabama, although sometimes in a numerical majority, as in Greene and Sumter Counties,[5] was generally excluded from the

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Judge, Sheriff and Circuit Clerk of Greene County reported on December 20 (App. I, *infra*, p. 74a) that, of 4,118 ballots cast, 1,938 were marked for the NDPA "straight ticket," which would have been counted for NDPA candidates for local office, had they appeared on the ballot. According to the certificate of the Secretary of State (a copy of which has been lodged with the Clerk of this Court), the regular Democratic Party nominees for local office in Greene County—the only candidates appearing on the ballot—received between 1,699 and 1,709 votes each.

[5] According to the 1960 census, the voting age population in Greene County was: 5001 Negro, 1649 white; in Sumter County: 6,814 Negro, 3,061 white. U.S. Bureau of the Census, *Census*

political process by one device or another. See, *e.g.*, *Giles* v. *Harris*, 189 U.S. 475; *Giles* v. *Teasely*, 193 U.S. 146; *Schnell* v. *Davis*, 336 U.S. 933; *United States* v. *Alabama*, 362 U.S. 602; *Alabama* v. *United States*, 371 U.S. 37; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310–315. Thus, in 1964, less than 20 percent of the Negroes of voting age throughout the State were registered to vote [6] and the situation was even worse in Greene, Marengo and Sumter Counties, directly involved in this litigation.[7] But the Voting Rights Act of 1965 brought a radical change. In Greene County, for instance, federal examiners appointed under the Act registered approximately 2,000 Negro voters, and, today, there are about twice as many Negroes as whites registered to vote in the county.[8]

The new situation encouraged Negro candidacies in several Alabama counties in 1966.[9] In Greene County,

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of Population: 1960, General Population Characteristics, Alabama, Final Report PC (1)–2B, Table 27.

[6] See *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 313.

[7] Before the enactment of the Voting Rights Act, although there were three times as many Negroes of voting age as whites in Greene County, only 275 were registered to vote (less than 6 percent), as compared to 2,305 whites; in Marengo, less than 4 percent of the potentially eligible Negroes were registered; in Sumter, about 5 percent. U.S. Commission on Civil Rights, *Political Participation*, Appendix VII, Table 4, p. 224.

[8] The approximate figures are 4,000 Negroes, 2,000 whites. *Ibid.*

[9] In the 1966 Democratic primary election 54 Negroes ran in 19 counties; 7 for sheriff, 11 for ten places in the state House of Representatives, 1 for the state Senate and 35 for county office.

five Negroes ran for local office in the Democratic primary of May 3. Four of the Negro candidates initiated a civil suit challenging the conduct of that primary.[10] However, this case was never resolved. See *Gilmore et al.* v. *Greene County Democratic Executive Committee et al.,* Civil Action No. 66-341 (N.D. Ala.). Subsequently, some of the Negro candidates, including Thomas Gilmore who was seeking the office of Sheriff, attempted to participate in the general election as nominees of the Freedom Organization, but they were refused recognition by the Probate Judge (Judge Herndon, the respondent on the motion for contempt in the present proceeding). Although the Court of Appeals for the Fifth Circuit stayed the election, rejecting one ground of challenge to the Negro candidate (*Gilmore* v. *Greene County Democratic Executive Committee,* 368 F. 2d 328 (C.A. 5, 1966)), the white candidate for Sheriff (the present incumbent, Lee) ultimately obtained from the State courts an injunction eliminating his Negro opponent. *Herndon* v. *Lee,* 281 Ala. 61, 199 So. 2d 74; *Gilmore* v. *Lee,* 210 So. 2d 415. This ruling—invoked here—was based on the failure of the Negro candidate to file the certificate required by the Corrupt Practices Act designating a financial committee within five days after his designation as the nominee of the Freedom Organization—the court holding that the designation filed by the party with the Probate Judge in May was operative, rather than his own notice of acceptance several months later.

[10] The fifth Negro won in the primary and was elected to the board of education in November 1966.

The experience of 1966 no doubt prompted the enactment of the Garrett Act (App. A, *infra*, pp. 3a–5a) as emergency legislation in May 1967. The new provision required all candidates proposing to participate in the general election to declare their intention to run and their party label by March 1—more than two months before the primary election. This statute, however, was never submitted to the Attorney General of the United States, nor approved by the United States District Court for the District of Columbia, pursuant to Section 5 of the Voting Rights Act (App. A, *infra*, pp. 1a–2a).

In 1968, many local offices were contested by Negro candidates. In Greene County, four of the five places on the Court of County Commissioners (the governing body of the county) and two seats on the five-member Board of Education came up for election. On or before March 1, (in apparent compliance with the Garrett Act), the present appellants from Greene County—like their white opponents (of whom all but one are incumbents)—filed declarations of their candidacies for these positions with the Probate Judge on forms which designated themselves as their own finance committee (in apparent compliance with the Corrupt Practices Act). See App. E, *infra*, pp. 60a–64a.[11] In each instance, the designation indicated that

[11] Certified copies of these declarations, which do not appear in the record that was before the district court, have been lodged with the Clerk of this Court. Appendix E, *infra*, lists all candidates filing such declarations, together with the dates of filing, and reprints a sample declaration.

the candidate sought the nomination of the Democratic Party. The white incumbents won the Democratic primary on May 7, but on the same day the NDPA held a mass meeting in Greene County [12] and nominated the same Negro candidates for the same offices. Both groups filed satements of their expenses in connection with the primary (see App. F, *infra,* pp. 65a–67a),[13] but no candidate then submitted a new designation of a financial committee with a view to the general election. Indeed, the Democratic Party nominees apparently never filed such new designations.

Although the detailed facts have not been developed for the other county races in Alabama, the same pattern was apparently followed. On a statewide basis the Democratic Party primary of May 7, 1968, nominated presidential electors pledged to support former Governor George Wallace, who was not seeking the Democratic nomination for President, but was form-

[12] Although the NDPA County Chairman subsequently certified the fact (Exh. L to Answer), the Probate Judge has questioned the occurrence of this mass meeting, but concedes that it might have been held without his knowledge (Deposition of Herndon, pp. 33–35).

[13] Certified copies of these financial statements have been lodged with the Clerk of this Court. Appendix F, *infra,* lists those who filed such statements in Greene County, together with the dates of filing, and reprints a sample statement.

The candidates who participated (or sought to participate) in the general election of November 5 subsequently also filed statements of their expenses in that connection. Certified copies of those financial statements with respect to Greene County likewise have been lodged with the Clerk of the Court. Appendix G, *infra,* pp. 68a–70a, lists those who filed such statements, together with the dates of filing, and reprints a sample statement.

ing a national third party. Two groups of Alabama Democrats sought to put forth a slate of presidential electors who would support the nominees of the party's national convention. The Alabama Independent Democratic Party nominated a slate of presidential electors who subsequently were certified by the Secretary of State to the county probate judges for inclusion on the ballot. By county and district mass meetings held on May 7, 1968, and by convention and caucuses held in Birmingham on July 20, 1968, the National Democratic Party of Alabama nominated a slate of presidential electors, a candidate for U.S. Senator, a candidate for President of the Alabama Public Service Commission, a candidate for U.S. Representative in each of eight congressional districts and a candidate for the Alabama House of Representatives.

On August 14, the Secretary of State wrote to the NDPA stating that "documentary evidence" concerning "the holding of required meetings on May 7, 1968" had been presented to her "concerning the National Democratic Party of Alabama's noncompliance with the requirements of the Alabama election laws" (Exh. S to Complaint, App. B, *infra,* pp. 27a–28a).[14] The letter requested that the NDPA "show cause why [it] * * * should not be excluded from the November general election ballot" (*ibid.*). In response,

[14] Although the letter cited no specific provision of Alabama law, it appeared from subsequent proceedings in this case that appellee was relying upon the requirement of Alabama law that nominations (other than those arising out of primary elections) be made at mass meetings held on the first Tuesday in May. Ala. Code 1958, Tit. 17, §§ 413, 414.

appellant Cashin, by letter dated August 19, requested clarification of the charges and service of copies of the documentary evidence (Exh. T to Complaint, App. B, *infra*, pp. 28a–29a). The matter remained in abeyance until after the Democratic Convention in Chicago, at which both the AIDP and the NDPA challenged the seating of the regular Democratic Party delegates and the former prevailed. Immediately thereafter, however, the Secretary of State publicly announced that, notwithstanding the challenge previously made, she would certify the NDPA nominees for ballot purposes if the certifications were received by September 5 (see Complaint, ¶ 16(c), App. B, *infra*, p. 16a, and Exh. K to the affidavit of Dr. Cashin attached to the Complaint, pp. 3–4, being clippings from the *Huntsville Times* of September 1 and the *Huntsville News* of September 5).[15] Those certifications were duly filed with the Secretary of State by that date (Answer, ¶¶ 9–10, App. D, *infra*, pp. 49a–51a) and certificates for local nominations were mailed to the appropriate probate judges on September 4 and received in all instances except one (which is not relevant here) on September 5 or September 6 (Affidavit of F. J. Zylman, attached to Complaint, App. B, *infra*, pp. 29a–36a).

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[15] Under Alabama law, nominees for state-wide or federal elections or any election throughout a judicial circuit or senatorial district must be filed with the Secretary of State "not less than sixty days before the day of election," and she must then "immediately" certify those nominees to the appropriate Probate Judge. In the case of county and local offices, the nominees must be certified directly to the Probate Judge within the same period. Ala. Code (1958), Tit. 17, § 145.

Appellants now assumed they would appear on the ballot. But there was yet to be one more change of mind by the Secretary of State. On September 10, Mrs. Amos publicly announced that she would not certify any of the NDPA candidates for inclusion on the ballot, except one candidate for United States Representative and the candidate for the Alabama House of Representatives (see Complaint ¶ 16, App. B, infra, p. 17a).[16] As already noted (*supra*, p. 4), neither then nor during the ensuing week was non-compliance with the Corrupt Practices Act stated as a reason for disqualification. A few days later, according to a recent deposition, the Probate Judge of Greene County, prompted by the County Solicitor who was attorney for the white incumbent candidates, determined that he would not place the NDPA candidates on the ballot because of their failure to timely file a new financial committee designation pursuant to the Corrupt Practices Act; but he did not so notify them (Herndon Deposition, pp. 29–31).[17] It does not appear, however, that the Probate Judges of Marengo or Sumter Counties ever intended to strike

[16] The court below noted that the reason underlying the two exceptions made by the Secretary of State "is not made clear" (J.S. App. 21a, n 16).

[17] Annexed to the Answer, filed in the court below on September 25, is an Affidavit from Judge Herndon dated September 20, explaining his disqualification of the local NDPA candidates because of failure to hold a mass meeting, failure to file Corrupt Practices Act designations of financial committees, and, with respect to some offices, failure to file declarations of intent under the Garrett Act. See Exhs. J and K to Answer. There is no indication that this affidavit was shown to appellants until the Answer was filed.

from the ballot the local NDPA candidates in their jurisdictions, although the same grounds were apparently available with respect to them also.[18]

As already noted, the present suit was filed on September 13, and a temporary restraining order requiring the inclusion of the NDPA candidates on the ballot was issued on September 18. Two days later, on September 20, a statement on behalf of the NDPA candidates designating each of them as his own finance committee under the Corrupt Practices Act was filed in the district court and with the Secretary of State and the appropriate Probate Judges.[19]

After receiving the district court's temporary restraining order, Judge Herndon caused the absentee ballots for the county to be printed with the names of all NDPA candidates (see App. K, *infra*, p. 79a). Before the regular ballots were printed, however, Judge Herndon, on October 14, learned of the district court's order of October 11 dissolving the re-

[18] As already noted (*supra*, p. 6), the Answer filed below makes no express allegation with respect to local NDPA candidates in those counties and no statement from either probate judge is annexed. The fair inference is that those officials intended to list the candidates on the ballot.

A letter dated September 23 from the Judge of Probate of Etowah County to the Attorney General of Alabama is attached to the Answer (Exh. I). Although it does not expressly draw any conclusion, the letter "informs" the Attorney General that the local NDPA candidates have not filed the finance committee designations required by the Corrupt Practices Act. Again, there is no indication that the candidates involved were notified.

[19] We are lodging with the Clerk of the Court a copy of that statement certified by Judge Herndon as received by him on September 21.

straining order, and, threatened with State court litigation by the attorney for the white incumbents, he directed the printer to omit the local NDPA candidates from the ballot (Deposition of Herndon, pp. 49–51, 63–64). At this same time Mrs. Amos was trying to determine how to rescind the certification of the federal and State candidates she had made pursuant to the District Court's order of September 18th. Before she decided, she learned of this Court's order restoring the temporary relief. (Deposition of Amos, p. 8).

Although the attorneys for the appellees were notified of this Court's orders of October 14 and October 18, they did not notify the Secretary of State (Deposition of Amos, p. 6) nor the probate judges (Deposition of Bookout, pp. 8–9). Judge Herndon read about the Court's action in the newspaper, but he did not think it applied to him or to the local county offices. The two newspapers which he normally reads had articles which stated that this Court had restored the injunction previously issued by the district court. Judge Herndon made no effort to find out whether the Court's order applied to him (Deposition of Herndon, pp. 45–48, 60–63, 70–71, 74–75).

ARGUMENT

INTRODUCTION AND SUMMARY

When this case came on for hearing in the court below, the general election had not yet been held in Alabama. The appellants—all of whom were seeking to have their names placed on appropriate ballots for

that election—had instituted this class action primarily to obtain relief directed at the November 5 election. In its current posture, as it is presented for decision by this Court, the case is markedly different. Although relief was denied below, interim orders entered here restored the NDPA candidates to the ballot and the election was held accordingly, except in one county. The issues before the Court are narrowed, therefore, to those which are relevant to the three counties where NDPA candidates were successful and to the claims of the six nominees who were kept off the ballot in Greene County. Except for the challenge to future enforcement of the Alabama statutes, the claims of the remaining candidates have been mooted by the results of the November 5 election. See, *e.g.*, *Shub* v. *Simpson*, 340 U.S. 881.

That is not to say that the case has dwindled to unimportance. On the contrary, it is no overstatement to characterize the basic question presented as whether the inexperienced efforts of the long-suppressed Negro electorate of Alabama shall be defeated, even now that its voice has been clearly heard, by belated invocation of very finicky requirements of local law. In many respects, the maneuverings of the responsible officials in the background of this litigation, here calculated to keep Negro candidates off the ballot, are reminiscent of earlier devices invoked to keep them off the registration rolls. See, *e.g.*, *United States* v. *Alabama*, 362 U.S. 602; *Alabama* v. *United States*, 371 U.S. 37; *United States* v. *Mississippi*, 380 U.S. 128; *Louisiana* v. *United States*, 380 U.S. 145. In our view, this attempt, also, must fail.

Specifically, three distinct challenges are advanced against some or all of the Negro candidates: (1) failure timely to comply with a provision of the Corrupt Practices Act which requires candidates to designate a financial committee within five days of their declaration of candidacy; (2) failure, in the case of the local NDPA candidates in Greene County, to hold the required mass meeting on May 7; and (3) failure to comply with the Garrett Act, enacted in 1967, which requires a declaration of candidacy, together with identification of party, before March 1 of the election year.

1. We turn first to the validity of the designation provision of Alabama's Corrupt Practices Act as applied to these appellants. We stress that the right to run for local elective office is, like the right to vote, protected by the Fourteenth Amendment, and that any limitation upon the right of local citizens to stand for public office must be judged by the same exacting standards as are applied to restrictions upon other constitutionally protected rights. Against the rights at stake, we assess the State interest in demanding meticulous compliance with the Corrupt Practices Act requirement, noting its apparent treatment as a minor formality by State officials. We comment on the uncertainties in the statute and the invitation to disparate treatment which it creates for local officials. Finally, focussing on the lack of notice or opportunity afforded to correct or contest an alleged technical delinquency, we conclude that, in the circumstances

revealed here (including substantial compliance and deceptive silence by officials), the belated invocation of the requirement against appellants was constitutionally impermissible.

2. We consider next the asserted failure of the Greene County candidates to be nominated by mass meeting. Here, as in the case of the Corrupt Practices Act, we believe that the objective of the statute is sustainable, but that in implementing it, the State may not deny prospective candidates an opportunity to confront and rebut whatever evidence the State officials may have of a failure to meet the statutory prerequisites. The probate judge of Greene County followed Alabama law in making his decision *ex parte,* without giving the NDPA nominees notice or opportunity to be heard. In an area so interwoven with constitutional rights, that procedure is simply inadequate.

3. Finally, we turn to the Garrett Act which, for the same reasons elaborated in our *amicus* brief in *Fairley* v. *Patterson, Bunton* v. *Patterson,* and *Whitley* v. *Williams,* Nos. 25, 26 and 36, this Term, we view as covered by Section 5 of the Voting Rights Act of 1965. Having failed to make it the subject of an action in the District of Columbia or to submit it for examination by the Attorney General, the appellees were not permitted to apply the Garrett Act in determining eligibility for the 1968 election.

I

APPELLANT CANDIDATES COULD NOT CONSTITUTIONALLY BE DISQUALIFIED FOR FAILURE TO COMPLY WITH THE FIVE-DAY DESIGNATION PROVISION OF THE ALABAMA CORRUPT PRACTICES ACT WITHOUT NOTICE AND AN OPPORTUNITY TO CORRECT TECHNICAL DEFECTS

The nominees of the National Democratic Party of Alabama were held disqualified to participate in the general election, among other reasons, because they allegedly failed to comply with a provision of the Corrupt Practices Act which requires every candidate "within five days after the announcement of his candidacy for any office," to file with the Secretary of State or, if he is running for county or local office, with the probate judge, "the name of not less than one or more than five persons elected to receive, expend, audit and disburse all moneys * * *." We do not dispute Alabama's authority to demand such a formal designation of a finance committtee. The question presented, in our view, is much narrower: it is whether, in the circumstances disclosed here, the radical statutory penalty of disqualification may be imposed for asserted non-compliance, without any opportunity offered for correction of the claimed technical defect. Several considerations lead us to answer that question in the negative.

First, it is important to remember that at stake here are some of "our most precious freedoms": "two different, although overlapping, kinds of rights—the

right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams* v. *Rhodes,* Nos. 543 and 544, decided October 15, 1968. The efforts of the NDPA to obtain a place on Alabama's ballot of November 5, 1968, involve both those rights—the latter being reinforced, in the circumstances of this case, by the Fifteenth Amendment's express prohibition against abridgment of the right to vote on account of race. It follows that only a "compelling state interest" could justify the frustration of the appellants' attempt to effectively associate as a political party and the free opportunity of their supporters to cast votes for them at the election. *Ibid.*

Second, the countervailing interest in meticulous adherence to the cited requirement of the Corrupt Practices Act is less than overwhelming. We are not dealing with a statutory standard of eligibility which sets down substantive qualifications for candidates for elective office, such as minimum age or residence requirements, or even educational or experience prerequisites. Nor is this a requirement designed to determine whether an announced candidate or party has sufficient support among the electorate to warrant giving the individual or his organization a place on the ballot. The State interest in obtaining a designation of a finance committee is, as the title of the Alabama legislation manifests, to prevent corrupt practices by insuring that a single individual or committee of not more than five can be looked to as respon-

sible for campaign contributions and expenditures. Although the statute prescribes that such a designation must be made within five days after the announcement of candidacy, no policy other than the general desirability of promptness would support an inflexible application of the five-day rule. The nominee, who, by oversight, fails to designate a finance committee but does so promptly upon being advised of his omission satisfies the statutory policy as thoroughly as the candidate who makes the designation without a reminder.

Third, although the statute provides that a noncomplying candidate "shall not be allowed to go upon the ballot at such election" and Alabama courts have enforced the penalty, there is reason to doubt how seriously the State treats the requirement. Indeed, the Corrupt Practices Act itself expressly provides that "any candidate may, if he sees fit to do so, declare himself" his own finance committee. And the standard printed form for declaring candidacy—used here—designates the candidate himself for this purpose, as though *pro forma.* See App. E, *infra,* pp. 60a–61a. Also revealing is the absence of any indication (as Judge Johnson noted in his dissenting opinion, J.S. App. 25a–26a) that Alabama officials have heretofore invoked the provision *sua sponte,* and its very belated appearance in this case as an "afterthought" (see J.S. App. 25a). And, finally, we note that the Probate Judges of Marengo and Sumter Counties have apparently never deemed it proper to object to the NDPA candidates on this ground, while the Probate

Judge of Etowah County did so ambiguously, with apparent hesitancy.

Fourth, the exact scope of the statutory requirement is far from clear. In *Herndon* v. *Lee,* 281 Ala. 61, 199 So. 2d 74, the Alabama Supreme Court held that the five-day period runs from the day of the Party's designation of the nominee, rather than from his formal notification of intention to run on the Party's ticket. Yet, in this case, designations filed on March 1 by the white candidates, long before they were certified as the nominees of the Democratic Party, were apparently deemed sufficient. Not so, however, with respect to the appellants, who filed identical designations on March 1, but ultimately ran under the NDPA label.

Fifth, the very ambiguities in the statute and the practical prerogative of local officials to invoke the provision or not, as they choose, affords obvious opportunities for disparate treatment. And, as we have just noted, such apparent anomalies occurred here, both in the different view taken of March 1 designations with respect to the white and Negro candidates and the different stance assumed by the various Probate Judges involved. Such a loose discretionary power is, of course, impermissible with regard to both the right to vote and rights derived from the First Amendment. *E.g., Louisiana* v. *United States,* 380 U.S. 145; *Staub* v. *City of Baxley,* 355 U.S. 313; cf. *Yick Wo* v. *Hopkins,* 118 U.S. 356; *Avery* v. *Georgia,* 345 U.S. 559, 564; *Whitus* v. *Georgia,* 385 U.S. 545, 552.

Sixth, the statutory scheme is especially vulnerable because the irrevocable penalty of striking from the ballot apparently can be imposed without notice or any opportunity given for contest or correction. As it affects the right to vote, such an untempered provision seems "too cabined and confined," all the more so as it operates against "a body of citizens lacking the habits and tradition of political independence and otherwise living in circumstances which do not encourage initiative and enterprise" (*Lane* v. *Wilson,* 307 U.S. 268, 276). Nor does the absence of notice and procedural safeguards fare better when the statute is judged under the First Amendment. See *e.g., Teitel Film Corp.* v. *Cusack,* 390 U.S. 139; *Freedman* v. *Maryland,* 380 U.S. 51; *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58; *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 682; *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 210–211 (Opinion of Brennan, J.). Precisely because "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballots and thus denied an equal opportunity to win votes" (*Williams* v. *Rhodes, supra*), the decision to disqualify a candidate must be hedged about with all the safeguards that the imperatives of the election schedule make possible. Certainly, there is no reason why notice cannot be given to the delinquent of his alleged failure to designate a financial committee, together with a brief opportunity to contest or correct the deficiency.

Finally, the particular facts of this case demonstrate the impermissible enforcement of the Corrupt

Practices Act requirement against these appellants. What we have already said demonstrates that the NDPA candidates arguably complied by designating themselves as a finance committee when originally declaring their candidacies on March 1. That those designations were in terms directed to the Democratic Primary, rather than the general election, is apparently not a defect in itself, since it is all their opponents have ever done, without suffering disqualification. Indeed, it would be natural to presume that those were continuing designations in every case where the candidate remained an active contestant. At least, it was not unreasonable for the appellants to suppose they had sufficiently complied, especially in the absence of any notice or challenge on this ground from the appropriate officials.

Against this background, it was obviously unfair to invoke a purported default under the Corrupt Practices Act against these candidates so late in the day. It was more than a month after the NDPA nominees had been challenged on other grounds that this defect was first claimed. Although she blew alternately hot and cold on the NDPA nominations for some weeks, the Secretary of State never mentioned the Corrupt Practices Act until September 17, after this suit was filed to contest other charges. Within five days thereafter, the alleged defect was cured, but too late, it was ruled. Yet, if notice of the supposed delinquency had been given even on September 10 (when Mrs. Amos finally resolved to deny appellants a place on the ballot), a timely designation in full compliance with the statute might have been sub-

mitted.[20] It is apparent that the NDPA candidates were lulled into default. Constitutional rights of this magnitude cannot be deemed waived on such a basis.

We conclude that the concurrence of circumstances present in this case forbids the disqualification of appellants as candidates on the ground that they failed to make timely designation of a financial committee. That is too high a price to exact for the sake of procedural tidiness or some other "remote administrative benefit to the State." *Carrington* v. *Rash*, 380 U.S. 89, 96; *Harman* v. *Forssenius*, 380 U.S. 528, 542; cf. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 377 U.S. 288.

II

APPELLANT CANDIDATES IN GREENE COUNTY COULD NOT CONSTITUTIONALLY BE DISQUALIFIED FOR AN ALLEGED FAILURE TO HOLD A MASS MEETING, IN THE ABSENCE OF PROOF THAT NO SUCH MEETING WAS HELD

The second ground of ineligibility alleged with respect to the six NDPA candidates for local office in Greene County is that they were not nominated by mass meeting on the first Tuesday in May as required by Ala. Code 1958, Tit. 17, §§ 413, 414. The only evidentiary support for this conclusion is the affidavit of the probate judge which states that no such meeting was held to his knowledge (Exh. J to Answer), although he later deposed that a meeting might have been held without his knowledge (Herndon Depo-

[20] Such filing would have been "within five days" under the general rules applicable to computations of time in Alabama. Ala. Code 1958, Tit. 1, Sec. 12.

sition, pp. 33–35).[21] On the other hand, the certificate of nomination sent to the probate judge on September 4 stated that the nominees had been selected pursuant to a mass meeting (Exh. L to Answer). We submit that this basis for disqualification is factually insufficient.

The control exercised by local officials over the names which are to go on the ballot is in the nature of a prior restraint upon the enjoyment of First Amendment rights. One of the procedural safeguards fixed by the decisions of this Court for restrictions of this kind is that the State official—who seeks to impose the limitation—must bear the burden of proving the facts upon which the denial of the constitutionally protected right is based. E.g., *Freedman* v. *Maryland, supra,* 380 U.S. 51 at 58; *Speiser* v. *Randall,* 357 U.S. 513, 526. The same rule applies, we submit, when the issue is whether a nomination which appears formally sufficient has actually been arrived at in violation of law. The burden is then on the State official seeking to disqualify the nominee to establish that the nomination is defective.

In the present case the probate judge not only failed to satisfy this burden; he provided the Greene County candidates with no opportunity to hear the allegations or to answer them. And, from all that appears in the record, his conclusion that no mass meeting was held in Greene County rests entirely on the fact that no such meeting was brought to his attention. Such evidence—or lack of it—is plainly insufficient to sustain the denial of the constitutional rights asserted by the

[21] In the course of a deposition of the probate judge taken on December 27, 1968, he admitted that a mass meeting may have taken place in Greene County and explained that his affidavit was intended only to assert that he knew of no mass meeting.

NDPA candidates and their supporters. In this respect, we submit, the Probate Judge of Greene County stands on no firmer footing than the Secretary of State, whose disqualification of other NDPA candidates on the ground that no mass meeting was held at Huntsville was summarily disposed of by the district court as "a violation of basic principles of equal protection, due process and essential fairness" (J.S. App. 22a). For like reasons, the finding made by the probate judge should be rejected.

III

APPELLANT CANDIDATES COULD NOT BE DISQUALIFIED UNDER THE GARRETT ACT BECAUSE THAT STATUTE IS INOPERATIVE BY VIRTUE OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

Putting aside other possible challenges to the statute, we confine ourselves to the submission that the Garrett Act, enacted in May 1967, could not validly be applied to appellants because it has not been approved in the manner prescribed by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which otherwise forbids the enforcement, in a State subject to the Act, of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."

1. In our amicus brief in *Fairley* v. *Patterson, Bunton* v. *Patterson,* and *Whitley* v. *Williams,* Nos. 25, 26 and 36, this Term, at pp. 11–27, we set forth our view as to the meaning of Section 5 of the Voting Rights Act. We argued that the language and purpose

of Section 5 bring within its reach legislative enactments which impose new conditions to be met by candidates for public office. Our submission, elaborated more fully there, is that a State statute which imposes such conditions restricts the range of choice available to the voters and thereby imposes "standards" or "prerequisites" with respect to voting.

The qualifying condition prescribed by the Alabama statute at issue here is essentially the same as one of the novel prerequisites imposed for candidates in Mississippi by the statute challenged in *Whitley* v. *Williams*, No. 36. In *Whitley* the amendment to the Mississippi Code required, *inter alia*, that independent candidates qualify for the general election at the same time as candidates were to qualify for the primary election. The Garrett Act had the very same effect. Prior to its enactment, every candidate wishing to run in a primary was required to file a declaration of candidacy by March 1. Ala. Code, 1958, Tit. 17, § 348. Independents were not subject to this requirement, however, and they were able to appear on the ballot after nomination by mass meeting held on the first Tuesday in May. Ala. Code, 1958, Tit. 17 §§ 413, 414. The effect of the Garrett Act was, like the counterpart statute in Mississippi, to require independent candidates to decide whether to run at the same time as candidates in the primary made their determination. The only distinction, in this respect, between this case and *Whitley* is that Mississippi law, prior to its amendment, permitted independent candidates to

qualify 40 days before the general election, whereas Alabama law prior to the Garrett Act authorized such candidacy only if the decision was made not later than the first Tuesday in May. In all other respects, however, the consequences of the statutory amendments enacted after the effective date of the Voting Rights Act of 1965 are identical in the two cases.

In this case, as in *Whitley*, we believe that the language and policy of Section 5 require that the new statutory provision not be applied until after review by a three-judge district court in the District of Columbia, or prior approval by the Attorney General. Accordingly, the appellee Secretary of State acted impermissibly in disqualifying independent candidates for failure to comply with the Garrett Act and future enforcement of that statute should now be enjoined.

2. We note here, as we did in our *amicus* brief in *Fairley, Bunton* and *Whitley, supra,* that although the constitutionality of the new legislation is not presently at issue, we are not urging reversal of the judgment below merely to require conformity with the prescribed statutory procedure. The Attorney General has not, of course, had an opportunity to give the Garrett Act plenary consideration, and the consequences of its implementation have not yet been fully explored. Such a full evaluation must await its submission to the Attorney General or, as Section 5 alternatively provides, the institution of an action in which the statute would be judged by a three-judge district

court in the District of Columbia. It suffices at this juncture to point out that in requiring independent candidates to declare on March 1, not only that they intend to run for office, but also to designate "the political party whose nomination for such office the person seeks * * * [or] that such person will be an independent candidate for the office," the Act prevents newly organized political groups from trying first to have their candidates elected in a party primary before determining to run as independents. A newly organized group such as the National Democratic Party of Alabama, which directs a major effort at Negro voters newly registered under the Voting Rights Act, cannot, under this system, first attempt to prevail in the Democratic Party primary before turning to independent candidates. Nor could it wait until the day of the primary before deciding whether to run independently. Hence, the change sought to be effected by the Garrett Act may well abridge the right to vote on account of race.[22] In the absence of a "compelling interest" justifying the requirement that an

[22] Since we believe that the Garrett Act may not permissibly be applied before it is submitted for review under Section 5, we do not think it necessary to discuss the question of its constitutionality under the Fourteenth Amendment in light of this Court's recent decision in *Williams* v. *Rhodes*, *supra*. We note, however, that the effect of requiring early declarations of candidacy is to discourage independent candidacies, and that here, as in *Williams*, the political group likely to be affected is one which "will rarely if ever be a cohesive or identifiable group until a few months before the election."

independent party engage in "extensive organization and other election activities by a very early date" (*Williams* v. *Rhodes, supra*)—which appellees have not demonstrated—the March 1 filing deadline may well impose an impermissible burden.

CONCLUSION

For the reasons stated, we conclude that the disqualification of appellants as candidates in the general election of November was impermissible. It follows that the judgment below should be reversed, and the cause remanded to the district court with the following directions:

(1) To issue an order directed to the appropriate state and county officials requiring them to treat the prevailing NDPA candidates in Etowah, Marengo and Sumter Counties as duly elected to the offices for which they ran;

(2) To issue an order requiring the appropriate State and local officials promptly to conduct a new election in Greene County for the offices of County Commissioner for District 1, 2, 3 and 4 and Places 1 and 2 on the County Board of Education, at which election the NDPA candidates for those positions shall appear on the ballot;

(3) To undertake such further proceedings as the district court may deem appropriate with respect to the alleged contempt of orders issued in this cause

by Probate Judge Herndon or other officials, as circumstances may suggest.[23]

Respectfully submitted.

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[23] We suggest further proceedings in the district court with respect to the motion for contempt because, as presently advised, we do not believe the necessary facts have been developed and deem further exploration of that issue here premature.

APPENDIX A

STATUTES INVOLVED

1. Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c):

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite,

standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

2. The pertinent provisions of the Alabama Corrupt Practices Act (§§ 274 and 275 of Title 17 of the Alabama Code (1958)):

> *§ 274. Committee to receive, expend, audit and disburse money or funds contributed.*— Within five days after the announcement of his candidacy for any office, each candidate for a state office shall file with the secretary of state, and each candidate for a county office or the state house of representatives shall file with the judge of probate of the county, and each candidate for a circuit or district office, including the state senate, shall file with the judge of probate of each county which is embodied in said circuit or district, a statement showing the name of not less than one nor more than five persons elected to receive, expend, audit, and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such persons to act as such committee, but any candidate, if he sees fit to do so, may declare himself as the person chosen for such purpose. If the statement required herein shall have been postmarked at any United States post office not later than midnight of the fifth day after the announcement of his candidacy, the candidate shall be deemed to have complied with the requirements of this section as to filing such statement within five days after the announcement of his candidacy. Such committees shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee; he shall keep detailed

account of receipts, payments and liabilities. The said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed, or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. If any vacancies be created by death or resignation or any other cause on said committees, said candidate may fill such vacancies, or the remaining members shall discharge and complete the duties required of said committee as if such a vacancy had not been created. No candidate for nomination or election shall expend any money directly or indirectly in aid of his nomination or election except by contributing to the committee designated by him as aforesaid.

§ *275. Candidate acting as own committee.*— Any person who shall act as his own committee shall be governed by the provisions of this article relating to committees designated by candidates. Failure to make the declaration of appointment or selection by any candidate as herein required is declared to be a corrupt practice, and in addition the name of such candidate so failing shall not be allowed to go upon the ballot at such election.

3. The Garrett Act (Act 243 of the 1967 Special Session of the Alabama Legislature, approved May 11, 1967):

Section 1. The secretary of state is hereby prohibited from certifying to the judges of probate of the several counties and such judges of probate are prohibited from causing to be printed on the ballots for a general election the name of any candidate for a state, district or federal office who does not file a declaration of intention to become a candidate for such office with the secretary of state on or before the first day of March of the year in which such general election is held. Such declaration shall

include a statement designating the political party whose nomination for such office the person seeks; or if such person is not a candidate for nomination by a political party, then such declaration shall state that such person will be an independent candidate for the office. Provided, however, this section shall not apply to the printing on the ballot of the names of persons nominated by political parties to fill vacancies in such parties' nominations for state, district or federal offices when the vacancy occurs after March first of the year in which a general election is held; and the name of every candidate nominated by a political party to fill any such vacancy shall be printed upon the ballot for the general election, if such name is duly certified by the party, within the time prescribed by law, as such party's nominee.

Section 2. The judges of probate of the several counties are hereby prohibited from causing to be printed on the ballots for any general election in their respective counties the name of any candidate in such election for a county office who does not file a declaration of intention to become a candidate for such office with him on or before the first day of March of the year in which such general election is held. Such declaration shall include a statement designating the political party whose nomination for such office the person seeks; or if such person is not a candidate for nomination by a political party, then such declaration shall state that such person will be an independent candidate for the office. Provided, however, this section shall not apply to the printing on the ballot of the names of persons nominated by political parties to fill vacancies in such parties' nominations for county offices when the vacancy occurs after March first of the year in which a general election is held; and the name of every candidate nominated by a political party to fill any such vacancy shall be printed upon the

ballot for the general election, if such name is duly certified by the party, within the time prescribed by law, as such party's nominee.

Section 3. Qualification on or before the first day of March of an election year as a candidate for nomination in a primary election as a political party's candidate in the general election shall for the purposes of enforcing this Act be deemed a filing of a declaration of intention to be a candidate for such office in the general election within the meaning of such term as used in this Act.

Section 4. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 5. The provisions of this Act are supplemental. It shall be construed in pari materia with other laws regulating elections; however those laws or parts of laws which are in direct conflict or inconsistent herewith are hereby repealed.

Section 6. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

APPENDIX B

In the United States District Court for the Middle District of Alabama (Northern Division)

Civil Action No. ——

SALLIE M. HADNOTT; REVEREND WILLIAM MCKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR., AND THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, A CORPORATION FOR THEMSELVES JOINTLY AND SEVERALLY, AND FOR ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

MABEL S. AMOS, AS SECRETARY OF THE STATE OF ALABAMA; EDWARD A. GROUBY, AS JUDGE OF PROBATE FOR AUTAUGA COUNTY, ALABAMA; AND ALL OTHER JUDGES OF PROBATE OF THE STATE OF ALABAMA, JOINTLY AND SEVERALLY, WHO ARE SIMILARLY SITUATED; ALBERT BREWER, AS GOVERNOR OF THE STATE OF ALABAMA; MACDONALD GALLION, AS ATTORNEY GENERAL OF THE STATE OF ALABAMA, AND THEIR SUCCESSORS IN EACH OFFICE, DEFENDANTS

COMPLAINT

(1) This action arises under Article I, sections 2 and 3, Article II, Section 1 (as amended by Amendment XII), the First, Ninth, Fourteenth, Fifteenth and Seventeenth Amendments of the Constitution of the United States and the following provisions of the United States Code: Title 42 §§ 1981, 1983 and 1988; and the Voting Rights Act of 1965, 42 U.S.C. §§ 1971–73p. Jurisdiction is conferred on this court by §§ 1331,

1343 (3) and (4), 2201, 2281, and 2284 of Title 28 of the United States Code.

(2) The plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The prerequisites of subsections (a), (b)(1), (b)(2) and (b)(3) of that rule are satisfied. There are common questions of law and fact affecting the several rights of Negro and other citizens to be not deprived of the equal right to vote and to have their votes counted and to be candidates for public office. The members of the class [Negro and white voters, candidates and members of the National Democratic Party of Alabama, a corporation, (hereafter referred to as "NDPA")] are so numerous as to make it impracticable to bring them all before this court. The claims of the plaintiffs are typical of the claims of the class, and the relief sought against defendant Edward A. Grouby as Judge of Probate of Autauga County, Alabama, is typical of the relief sought against all Judges of Probate in Alabama. A common relief is sought. The interests of the class are adequately represented by plaintiffs and defendants. The prosecution of separate actions by and against individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Furthermore, the parties opposing the plaintiffs' class have acted and re-

fused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

The questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(3) Plaintiff, Sallie M. Hadnott, a Negro citizen of the State of Alabama, over the age of twenty-one years, resides at 626 Easy Street, Prattville, Autauga County, Alabama. Mrs. Hadnott is the duly qualified and properly selected NDPA nominee for election to the Board of Revenue and Control, District 2, Autauga County. She and all other individual plaintiffs are duly qualified and registered voters in the State of Alabama. She sues for herself and all other persons similarly situated.

(4) The plaintiff, Reverend Mr. William McKinley Branch is a Negro citizen of the State of Alabama over the age of twenty-one (21) and resides in Forkland, Greene County, in the 5th Congressional District of Alabama. The Reverend Branch is a duly qualified and properly selected NDPA nominee for election as a Presidential elector and for election to the United States House of Representatives from the 5th Congressional District of Alabama. He sues for himself and all other persons similarly situated.

(5) The plaintiff, Jack Drake, is a white citizen of the State of Alabama, over the age of twenty-one (21) years and resides in Tuscaloosa, Tuscaloosa County, Alabama. Mr. Drake is a duly qualified and properly selected NDPA nominee for election as Pres-

idential Elector. He sues for himself and all other persons similarly situated.

(6) The plaintiff, John Henry Davis, is a Negro citizen of the State of Alabama, over the age of twenty-one (21) years, and resides in Ashville, St. Clair County, Alabama. Mr. Davis is the duly qualified and properly selected NDPA nominee for election as a Presidential Elector and for election as President of the Alabama Public Service Commission. He sues for himself and all other persons similarly situated.

(7) The plaintiff, Robert P. Schwenn, is a white citizen of the State of Alabama, over the age of twenty-one (21) years and resides in Huntsville, Madison County, Alabama. He is a duly qualified and properly selected NDPA nominee for election as Presidential Elector and for election to the United States Senate. He sues for himself and all other persons similarly situated.

(8) The plaintiff, Thomas Wrenn, is a Negro citizen of the State of Alabama, over the age of twenty-one (21) years and resides in Birmingham, Jefferson County, Alabama. He is the duly qualified and properly selected NDPA nominee for election to the House of Representatives from the 6th Congressional District of Alabama. He sues for himself and all other persons similarly situated.

(9) The plaintiff, Dr. John L. Cashin, Jr., is a Negro citizen of the State of Alabama, over the age of twenty-one (21) years, and resides in Huntsville, Madison County, Alabama. He is the duly elected and qualified chairman of the NDPA, and a registered and qualified voter in said county and state. He sues for himself and as chairman of the NDPA, and on behalf of all members of the NDPA and all other persons similarly situated who are duly registered and qualified voters in the State of Alabama and who

desire the opportunity to vote for candidates nominated by the NDPA, and to have their votes counted.

(10) The plaintiff, NDPA, is a political party duly organized and incorporated under and by virtue of the laws of the State of Alabama. It brings this suit on its own behalf as a legal entity and on behalf of its members and nominees for local, state and national office. The NDPA seeks to further and advance, through the electoral process, the selection of progressive candidates for office on a basis other than race. It nominated its nominees for election in accordance with Title 17, § 413–416 Code of Alabama (Recomp. 1958) at properly held county and district meetings on May 7, 1968, and at its state convention held in Birmingham, Alabama, on July 20, 1968. Its nominees for national, state, county, and local office number, to-wit 119, 20 of whom are white and 94 of whom are Negroes. The race of 5 nominees is not known.

(11) Defendant Mabel S. Amos, and her successors in office, is sued individually and in her official capacity as the duly elected, qualified and acting Secretary of State of Alabama with her office and official residence in Montgomery, Alabama. The Secretary of State of the State of Alabama is a constitutional officer, a part of the executive branch of the government of the State (§ 112 of Article V of the Alabama Constitution of 1901), is the person to whom all returns of elections for members of the legislature must be made (*Id.* § 193), and "shall perform such duties as may be prescribed by law" (*Id.*, § 137; See also § 134). Among other duties, the Secretary of State of the State of Alabama is charged by law to:

Keep papers belonging to the legislature (Title 32, §§ 7, 10 and 29, Alabama Code (Recomp. 1958)) and engrossed copies of laws and joint resolutions (*Id.*,

§ 8); perform sundry duties, including the performance of "* * * such other duties as he is or may be required by law to perform" (Title 55, § 182, *Id.*, see also *Id.*, §§ 183–204); receive and preserve packages of ballots as well as written requests therefor from those appointed to decide election contests (Title 17, § 64(28), *id.*, as amended); receive certificates of namination by political parties as well as petitions of electors to nominate independent candidates and to certify the names of such nominees to the various judges of probate (*Id.*, § 145); receive returns of election and to be present for the opening and counting of those so received, the governor or attorney general also to be present thereat (*Id.*, § 201); furnish certificates of election to members of the legislature (*Id.*, § 205); furnish blank certificates of the results of elections for members of the legislature and receive same back when filled out (*Id.*, § 209); perform duties required for general elections in special elections (*Id.*, § 221); receive the names of members of a committee to receive, expend, audit and disburse campaign contributions (*Id.*, § 274); receive the certification of candidates for nomination to the legislature and certify same to the probate judges (*Id.*, § 334); receive notice of the entering of a primary election by the state executive committee or other governing authority of a political party (*Id.*, § 346); receive certification from the chairman of the state executive committee of a political party as to the names of nominees not having a majority, but running first and second in the first primary election and, in turn certifying those names to the various probate judges whose counties are affected thereby (*Id.*, § 366); certify to the probate judge lists of the nominees of political parties (*Id.*, § 369); notify probate judges of

the results of election contests before the state executive committee of a political party (*Id.*, § 387).

Defendant Amos has certified herself as a nominee of the Alabama Democratic Party (hereafter referred to as the "DP") for election as a Presidential Elector pledged, if elected, to support the candidacy of George C. Wallace for President of the United States.

(12) Defendant, Edward A. Grouby, and his successors in office, is sued in his official capacity as the duly elected, qualified and acting Probate Judge for Autauga County, Alabama, and further as the representative of that class consisting of all Probate Judges in the State of Alabama. A judge of probate has authority "to exercise such other powers as are, or may be, conferred on him by law" (Title 13, § 297, Alabama Code (Recomp. 1958); see also *Id.* §§ 271–312). Among other duties of probate judges they are charged by law to:

Cause to be delivered to each polling place alphabetical lists of those who have paid their poll tax and those who are registered to vote thereat (Title 17, § 138, *id.*); receive and preserve for a time, one copy of the certificate of results of an election (*Id.* § 139); receive certification of nominations by political parties for state legislative offices as well as certification of those independent candidates properly nominated therefor by petitions of electors and to cause the names of such nominees to be printed upon the ballots utilized in his county (*Id.* § 145); receive from candidates not accepting their nominations notification to that effect (*Id.* § 148); preserve all certificates and petitions for nomination for six months after the election (*Id.* § 168); cause the printing of voter instruction cards (*Id.* § 165); cause ballots, blank poll lists, certificates of results, oaths, and all other stationery

and blank forms necessary to conduct the election to be printed and cause the foregoing to be properly distributed (*Id.* § 186); assemble with others, and make a correct statement of election results (*Id.* § 199); receive the original public declaration of the results of an election of members of the house of representatives and to record same and provide certified copies thereof and to allow a copy thereof to be posted on the courthouse door (*Id.* § 200); receive and forward to the secretary of state certificates setting forth the returns of election for members of the legislature (*Id.* § 209); perform duties required for general elections in special elections (*Id.* § 221); receive the names of members of a committee to receive, expend, audit and disburse campaign contributions (*Id.* § 274) and receive from it detailed, itemized statements of expenditures made (*Id.* § 278) with an affidavit of the candidate attached thereto (*Id.* § 280); prepare and distribute ballots for the primary elections (*Id.* §§ 344, 366); furnish to the officers of a primary election supplies as well as envelopes (*Id.* § 354); supply voters whose vote are challenged with certificates to the effect that such voters' names are on official voters lists (*Id.* § 355); allow his office to be utilized as the proper place for receipt of ballot boxes by the county chairman of a political party (*Id.* § 363); receive from the secretary of state lists of the nominees of the political parties (*Id.* § 369); furnish certified copies of the registration lists to the parties to an election contest (*Id.* § 377); receive notification of the results of election contests before the state executive committee of a political party (*Id.* § 387); accept expense accounts of candidates for the legislature (*Id.* § 400).

(13) Defendant, Albert Brewer, and his successors in office, is sued in his official capacity as the duly qualified and acting governor of the State of Alabama

with his office and official residence in Montgomery, Alabama. The Governor is charged with the general duty of enforcing the Statutes of the State of Alabama and with the particular responsibility under Title 17 of proclaiming the results of the election (*Id.* § 202); proclaiming the results of elections on amendments to the Constitution (*Id.* § 212); ordering special elections (*Id.* § 217); proclaiming special election for representatives in Congress or state office (*Id.* § 218); estimate the election returns, ascertain who are elected, and notify them by proclamation (*Id.* § 224) and in case of a tie in the election of Presidential Electors break such tie by casting the decisive vote (*Id.* § 225).

Defendant Brewer has been certified by Defendant Amos as a nominee of the DP for election as a Presidential Elector pledged if elected, to support the candidacy of George C. Wallace for President of the United States. Mr. Wallace is the candidate of the American Independent Party for President of the United States in states other than Alabama.

(14) Defendant, MacDonald Gallion, is the duly elected, qualified and acting Attorney General of the State of Alabama, with his office and official residence in the City of Montgomery, Montgomery County, in said state. The Attorney General of Alabama is a constitutional officer, a part of the executive branch of the government of that state (§ 112 of Article V of the Alabama Constitution of 1901), and "shall perform such duties as may be prescribed by law" (*Id.* § 137). Among other duties of the Attorney General of Alabama, he is charged by law to:

Appear in the courts of the United States when so required by the Governor, in writing (Title 55, § 228, Alabama Code (Recomp. 1958)); institute and to prosecute all civil actions necessary to protect the

rights of the state (*Id.* § 229); advise probate judges (*Id.* § 240); the secretary of state and other state departments (*Id.* § 228) as to the law and a written opinion from him protects the state or county officer receiving it from liability for official acts performed in accordance wherewith (*Id.* § 241); direct and control all litigation concerning the interests of the state or a department thereof and (with the approval of the governor) to hire counsel therefor (*Id.* § 244); be present, in company with the governor or secretary of state for the official canvass (the opening and counting) of all returns of elections required by law to be sent to the secretary of state (Title 17, § 201, Alabama Code (Recomp. 1958)).

Defendant Gallion has been certified by defendant Amos as the nominee of the DP for election as a Presidential Elector pledged, if elected, to support the candidacy of George C. Wallace for President of the United States.

First Cause of Action

(15) Plaintiffs allege on information and belief: (a) that the Alabama Democratic Party of which the defendants (each of whom is white) is a member is governed by a State Executive Committee consisting of seventy-two (72) white persons and no Negroes; (b) that the state party offices of the American Independent Party, the Alabama Democratic Party, the Prohibition Party, the Alabama Republican Party, and the Alabama Conservative Party are held by white persons only; (c) that the Alabama Democratic Party office holders in Alabama are as follows—probate judges, 67 whites, no Negroes; members of the State House of Representatives, 106 whites, no Negroes; members of the State Senate, 35 whites, no Negroes; sheriffs, 66 whites, 1 Negro, and all

State Supreme Court, Court of Appeals, circuit and county judges are white. Additionally, upon information and belief, neither the Alabama Independent Democratic Party, the American Independent Party, the Alabama Democratic Party, the Prohibition Party, the Alabama Republican Party nor the Alabama Conservative Party have nominated a single Negro for election to a state, local, county or national office. Three Negroes have been nominated for election as Presidential Electors by the Alabama Independent Democratic Party (hereafter referred to as the "AIDP").

(16) Defendant Amos prior to September 5, 1968: (a) refused to allow the NDPA to utilize the symbol of the donkey as its party emblem; (b) stated she would refuse to allow the NDPA a position on the general election ballot and deny its nominees certification and the printing of their names on said ballot; and, (c) following the Democratic National Convention in Chicago retracted such position publicly stating that she would allow the NDPA a place on the general election ballot and would certify the names of its nominees and have their names appear on said ballot. Thereafter, on September 5, 1968, plaintiff Cashin filed with defendant Amos a Certificate of State Convention setting forth the names of NDPA nominees for Presidential Electors, United States Senator and members of the United States House of Representatives, President of the Alabama Public Service Commission, and place 2, District 3, (Madison County) for the Alabama House of Representatives a vacancy occasioned by the resignation of the person then holding such office. Simultaneously, and for the information of said defendant, he provided her with a list of the names of NDPA nominees for county and local office. Defendant Amos accepted such filing and did

not indicate that she then intended to deprive plaintiffs of ballot position or NDPA nominees the printing of their names on ballots. On September 10, 1968, plaintiffs learned from press accounts that all party nominees had been denied the right to have their names placed upon the general election ballot except for plaintiff Branch and Myrna Copeland, the nominee for the aforementioned vacancy in the State House of Representatives.

(17) The said action of the defendants Amos and Grouby deprived plaintiffs and the Negro and other voters of Alabama of the equal right to vote for candidates of their own choosing and to have those votes counted in violation of the due process and equal protection of laws clauses of the fourteenth amendment, the right to freely express themselves as guaranteed by the first amendment, the right to vote and run for political office regardless of race as guaranteed by the fourteenth and fifteenth amendments and the rights retained by the people as guaranteed by the ninth amendment all of the Constitution of the United States.

Second Cause of Action

(18) Plaintiffs reallege paragraphs. (1) through (16) hereof, inclusive, in their entirety.

(19) Declarations of intention were filed and compliance was had with the provisions of Act No. 243, of the Alabama Legislature, Special Session, 1967 (hereafter referred to as the "Garrett Law") for the offices of Presidential Elector, United States Senator, and President of the Alabama Public Service Commission. Such declarations were filed for the offices of Representative in the United States House of Representatives for Districts 2, 3, 4 and 5. They were not filed for Districts 1, 6, 7 and 8. Plaintiff Hadnott (NDPA nominee for election to the Board of

Revenue and Control, District 2, Autauga County) attempted to have filed a declaration of intention with Defendant Grouby on or before March 1, 1968, but was denied the right to have this done at his office. Later, she was offered the opportunity to come to his residence in the nighttime to file said declaration with him. This she refused to do. On September 5, 1968, during the business day, she attempted to file a duly executed Certificate of Mass Meeting setting forth her nomination and other nominations with Defendant Grouby but he was absent from his office. On that day she deposited the said certificate in the United States mail postage prepaid properly addressed to said defendant. Plaintiff Wrenn (NDPA nominee for election as Representative from the 6th Congressional District) neither filed nor attempted to file a declaration of intention but did on September 5, 1968, file with the Judge of Probate of Jefferson County, Alabama, a duly executed Certificate of Mass Meeting setting forth his nomination and, on the same day was designated a nominee by the NDPA in the Certificate of State Convention filed with Defendant Amos.

(20) The Garrett Law (Act No. 243, Alabama Legislature, Special Session 1967) is unconstitutional on its face and in its application to plaintiffs and the class they represent in the following respects:

(a) The requirement that a candidate file a notice of intention eight months prior to the general election is arbitrary, capricious and unreasonable and in violation of the due process and equal protection clauses of the fourteenth amendment.

(b) The Act invidiously discriminates against minority political parties and their members in violation of the equal protection clause of the fourteenth amendment.

(c) The Act was racially motivated, or alternatively has a racially exclusive effect, is invidiously discriminatory, and perpetuates white-only political office retention in the state of Alabama in violation of the first, ninth, fourteenth and fifteenth amendments of the Constitution of the United States.

(d) The effect of the Act is to unjustifiably prevent plaintiffs from seeking public office and to effectively disenfrancise plaintiffs and the class they represent in violation of Article I, Sections 2 and 3, Article II, Section 1 (as amended by Amendment XII), the first, ninth, fourteenth, fifteenth, and seventeenth amendments of the Constitution of the United States.

Third Cause of Action

(21) Plaintiffs realleged paragraphs (1) through (16) and (19) through (20) hereof, inclusive, in their entirety.

(22) The refusal of the defendants Amos and Grouby and Judges of Probate of Alabama to place the names of the full slate of NDPA nominees on the ballots deprives plaintiffs and the class they represent of the right to vote a straight ticket for the nominees of the party (a right otherwise guaranteed them by the law of Alabama (Title 17, § 157, Code of Alabama (Recomp. 1958) and assured those who desire to vote a straight ticket for the nominees of Alabama's Democratic and Republican Parties). It additionally deprives the nominees of the NDPA of the political strength derivable from straight ticket voting. Said refusal further requires the Negro and other voters of Alabama who desire to vote for candidates for Presidential Elector who support the national nominees of the Democratic Party for President to vote a split ticket.

(23) The denial to illiterate voters of the State of Alabama of the right to vote a straight party ticket for the nominees of the NDPA constitutes a test or device as defined by Section 4 of the Voting Rights Act of 1965. (Title 42 U.S.C. § 1973 b).

(24) The action of the defendants in the aforementioned respects deprives the plaintiffs and the class they represent of the equal right to vote in violation of the due process and equal protection of laws clauses of the fourteenth amendment, the fifteenth and seventeenth amendments, Article I, Sections 2 and 3, Article II, Section 1 (as amended by the twelfth amendment) and the first and ninth amendments all of the Constitution of the United States, and Title 42, Sections 1981 and 1983 U.S.C. and Title 28 Sections 1971–73 p, U.S.C., more particularly, Title 28 U.S.C. Sections 1973 b and i (a).

Fourth Cause of Action

(25) Plaintiff realleges paragraphs (1) through (16), (19) through (20) and (22) through (23), inclusive, in their entirety.

(26) Plaintiffs aver upon information and belief that other parties assigned ballot space by the defendants Amos and Grouby and other judges of probate and the nominees for election by such parties were placed on the ballot despite their non-compliance with applicable provisions of the law of Alabama. For example the Alabama Independent Democratic Party ("AIDP") is by the terms of its charter (See Exhibit B to the affidavit of John L. Cashin, Jr., filed simultaneously herewith) not definable as a political party nor does such party purport to be more than a vehicle for nomination of candidates for Presidential Elector.

(27) Prior to September 5, 1968, negotiations were conducted with the chairman of the AIDP in which the NDPA offered to nominate for Presidential Elector the nominees selected by the AIDP and to place them on the NDPA ballot. The AIDP declined to do so on the ground that Title 17, Section 148, Code of Alabama (Recomp. 1958) which provides, in part, that: "[t]he name of each candidate shall appear but one time on said ballot, and under only one emblem" forbade such action.

(28) The Presidential Elector nominees of the NDPA are pledged to support the nominees for President and Vice-President of the Democratic National Convention and intend to do so if elected unless requested to withdraw or not do so by said Democratic nominees in which event they will consider themselves unpledged.

(29) Title 17, Section 148, Code of Alabama (Recomp. 1958) is facially unconstitutional and unconstitutional in its application to plaintiffs in that it violates Article I, Sections 2 and 3, Article II, Section 1 (as amended by the twelfth amendment), the [illegible] ninth, the due process and equal protection clauses of the fourteenth amendment, the fifteenth and seventeenth amendments, all of the Constitution of the United States and the Voting Rights Act of 1965 (Title 42, Sections 1971–73(p)).

Fifth Cause of Action

(30) Plaintiff realleges paragraphs (1) through (16), (19) through (20), (22) through (23), and (26) through (28) hereof, inclusive, in their entirety.

(31) Title 17, Section 125, Code of Alabama (Recomp. 1958) which provides that where more than two parties submit lists of persons to serve as inspector and clerk for each voting place to the appoint-

ing board (judges of probate, sheriffs, and clerks of the circuit courts) ". . . appointments shall be made from the lists presented by the two political parties having received the highest number of votes in the state in the next preceding regular election. . . ."

(32) Title 17, Section 125, Code of Alabama (Recomp. 1958) is facially unconstitutional and unconstitutional in its application to plaintiffs in that it violates Article I, Sections 2 and 3, Article II, Section 1 (as amended by the twelfth amendment), the first, ninth, the due process and equal protection clauses of the fourteenth amendment, the fifteenth and seventeenth amendments, all of the Constitution of the United States and the Voting Rights Act of 1965 (Title 42, Sections 1971–73(p) U.S.C.).

Sixth Cause of Action

(34) Plaintiff realleges paragraphs (1) through (16), (19) through (20), (22) through (23), and (26) through (28) hereof, inclusive, in their entirety.

(35) Title 17, Sections 224 and 225 Code of Alabama (Recomp. 1958) provide that the Governor estimate the returns, ascertain who has been elected and issue proclamations of election and cast the deciding vote if the nominees for Presidential Elector are tied. Section 224, *id.* provides that the Attorney General or Secretary of State witness the acts of the Governor under said section.

(36) The defendants Amos, Brewer and Gallion, Governor, Secretary of State and Attorney General respectively are each nominees of the Alabama Democratic Party for Presidential Elector and are pledged to support the candidacy of George C. Wallace for President. By virtue of their dual position as candidates and election officials they are placed in a position of having conflicting interests in violation of the

due process and equal protecton of laws clauses of the fourteenth amendment and Article II Section 1 (as amended by the twelfth amendment) of the Constitution of the United States and such statutes are unconsitutional in their application to the November 5, 1968, general election.

Seventh Cause of Action

(36a) The ten nominees for Presidential Elector proposed by the Alabama Democratic Party include seven state officers who hold offices of profit. Nominees for places one through three, six, and eight through ten are, respectively: Earl Morgan, District Attorney for the Tenth Judicial Circuit of Alabama; defendant Amos, Secretary of State of Alabama; defendant Gallion, Attorney General of Alabama; Richard "Dick" Beard, Commissioner of Agriculture and Industries of Alabama; defendant Brewer, Governor of Alabama; Mrs. Agnes Baggett, Treasurer of Alabama and Dr. Ernest Stone, Superintentent of Education of Alabama.

(36b) Article II, Section 1, Clause 2 of the Constitution of the United States provides, in part, ". . . no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

(36c) Although the seven aforementioned nominees for Presidential Elector do not hold office under the United States they are state officers subject to the sanctions of Sec. 280 of the Alabama Constitution of 1901 and Title 41, Section 5 (7) which provides, in part, that no person shall ". . . hold two offices of profit at one and the same time under this state. . . ." The office of Presidential Elector is an office of profit.

(36d) The aforementioned nominees of the Alabama Democratic Party are prohibited by Section

280 Alabama Constitution of 1901 from serving as Presidential Elector and retaining their presently held state offices on December 10, 1968, if elected.

Equitable Relief

(37) Plaintiffs further show that this is a proceeding wherein they seek a declaration of their rights pursuant to § 2201 of Title 28, U.S.C., setting forth that the defendants, their officers, agents, servants, employees, or attorneys and those persons in active concert or participation with them, are utilizing, enforcing and maintaining a policy, custom, practice, scheme or usage which arbitrarily, intentionally and systematically deprives them of their equal right to vote and to run for public office, thereby violating Article I, Sections 2 and 3, Article II, Section 1 (as amended by the twelfth amendment) and the first, ninth, fourteenth, fifteenth, and seventeenth amendments of the Constitution of the United States and the Voting Rights Act of 1965. They seek additionally a declaration of the facial and applicatory unconstitutionality of Act No. 243, Alabama Legislature, Special Session, 1967 (the Garrett Law) and Title 17, Sections 125 and 148, Code of Alabama (Recomp. 1958) and the applicatory unconstitutionality of Sections 224 and 225 *id.*

(38) There is between the parties an actual controversy as herein set forth. The plaintiffs, and others similarly situated and affected on whose behalf this suit is brought are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of; they have no plain adequate or complete remedy to redress the wrongs and unlawful acts herein complained of, other than this action for a declaration of rights, temporary restraining order and an injunction, any other

remedy to which plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury, damage and inconvenience to the plaintiffs and those similarly situated.

WHEREFORE, PREMISES CONSIDERED, on all causes of action, separately and severally, plaintiffs respectfully pray that this Court take jurisdiction of this case, that a special three-judge court be called to hear and determine this cause as by law provided in 28 United States Code, § 2281 et seq., that it issue a temporary restraining order and a preliminary injunction to be made permanent later against the defendants, their officers, agents, servants, employees, or attorneys and those persons in active concert or participation with them, and plaintiffs further pray that the Court advance this case on the docket and order a speedy hearing thereof and upon such hearing adjudge, decree and declare the rights and legal relations of the parties hereto in order that such declaration shall have the force and effect of a final judgment or decree, and plaintiffs further pray that the Court enter a judgment or decree declaring the practice, policy, custom, or usage of the defendants, their officers, agents, servants, employees or attorneys and those persons in active concert or participation with them in depriving them of their equal right to vote and the right to run for public office in violation of the laws and Constitution of the United States.

Plaintiffs further pray that the defendants, their agents, officers, servants, employees or attorneys and those persons in active concert or participation with them be temporarily and permanently enjoined from enforcing those provisions of the Alabama Code hereinbefore set forth in a manner which would deprive

plaintiffs and all other persons similarly situated from their equal right to vote and the right to run for public office, said injunction to include but not be limited to the following:

1. The defendants Amos, Brewer and Gallion be required either to surrender their right to serve as estimators, counters of ballots, proclaimers or certifiers of results, or tie-vote breakers in the November 5, 1968, general election or, in the alternative, to cause their names to be removed from the ballot as nominees for Presidential Elector under the Alabama Democratic Party or any other party name or label.

2. That the defendant Amos show cause as to her reason for placing the names of all Presidential Elector nominees on the ballot under their respective party labels and, in the event such nominees or parties be shown not to have been nominated or formed in accordance with the law of Alabama, or in the event no or insufficient cause be shown for placing such names or parties on the ballot, order her to remove such names or parties therefrom.

Plaintiffs pray such other further and general relief as may be appropriate under the premises.

Respectfully submitted.

/s/ Charles Morgan, Jr.

CHARLES MORGAN, JR.
5 Forsyth Street, N.W.,
Atlanta, Georgia 30303,
ORZELL BILLINGSLEY, JR.,
1630 Fourth Avenue North,
Birmingham, Alabama 35203,
Attorneys for Plaintiffs.

MELVIN L. WULF,
Eleanor Norton,
156 Fifth Avenue,
New York, New York 10010.
Of Counsel

Verification of Complaint

I John L. Cashin, Jr., have read the foregoing complaint. I am informed and believe and upon such information and belief state that all matters asserted therein are true.

/s/ JOHN L. CASHIN, Jr.

Sworn to and subscribed before me at Atlanta, Georgia this 13th day of September, 1968.

/s/ LYNNE WISDOM,
Notary Public, Georgia,
State at Large.

My Commission Expires April 21, 1972. (Seal)

(EXHIBIT S TO AFFIDAVIT OF JOHN L. CASHIN, JR., ATTACHED TO COMPLAINT)

STATE OF ALABAMA,
OFFICE OF SECRETARY OF STATE,
Montgomery, Ala., August 14, 1968.

Mr. ALVIS HOWARD, Jr.,
Chairman, National Democratic Party of Alabama,
Huntsville, Ala.

DEAR MR. HOWARD: Responsible citizens have presented documentary evidence to me concerning the National Democratic Party of Alabama's non-compliance with the requirements of the Alabama election laws. The evidence concerns the holding of required meetings on May 7, 1968. It is available for your inspection.

In view of this evidence, I must call on you to show cause why the National Democratic Party of Alabama should not be excluded from the November general election ballot.

I intend to handle this matter with absolute impartiality and fairness. I would appreciate your provid-

ing any evidence at your disposal at the earliest possible date in order that you will not be prejudiced by a hurried consideration of it.

Yours very truly,

/s/ Mabel S. Amos
MABEL S. AMOS,
Secretary of State.

(EXHIBIT T TO AFFIDAVIT OF DR. JOHN L. CASHIN, JR., ATTACHED TO COMPLAINT)

AUGUST 19, 1968.

MRS. MABEL AMOS,
Office of Secretary of State,
Montgomery, Ala.

MRS. AMOS: This will inform you of the receipt of your letter written August 14, 1968 and received, August 17.

Please send four copies of the "documentary evidence" in your possession concerning "the holding of required meetings on May 17, 1968," to me at the above address, four copies to me at the Conrad Hilton Hotel in Chicago, and four copies to our Counsel, Orzell Billingsley, at the Masonic Temple Building in Birmingham, Alabama. Further, please clarify any charges you are making against The National Democratic Party of Alabama, as your letter failed to mention what evidence you wish to see.

Since you stated that you wish to handle this matter with absolute impartiality and fairness, since you wish an early reply, and since you are already aware of the necessity for being in Chicago, I would appreciate it if you would send the copies of the alleged "documentary evidence" at the earliest possible date.

It is hard to believe that the public or the courts would find credible the "absolute impartiality and

fairness" of a candidate for public office in a judgement made concerning a competing political party. Therefore, to make this intention to be impartial and fair, I call upon you to withdraw as a candidate for elector on the Alabama Democratic Party slate.

Yours truly,

JOHN L. CASHIN.

JLC:ars
cc:
Vice President Hubert Humphrey
Senator Eugene McCarthy
Senator McGovern
Charles Morgan, Jr.
Stephen Raphael
Joseph Raub
Orzell Billingsley

(AFFIDAVIT OF F. J. ZYLMAN, ATTACHED TO COMPLAINT)

In the United States District Court for the Middle District of Alabama (Northern Division)

Civil Action No. ——

SALLE M. HADNOTT, ET AL., PLAINTIFFS

vs.

MABEL S. AMOS, ETC., ET AL., DEFENDANTS

AFFIDAVIT

F. J. Zylman, being duly sworn, deposes and says: As Executive Director of the National Democratic Party of Alabama, in the performance of my duties, in order to file the names of nominees for local office in those counties where, on May 7, 1968, mass meet-

ings were held and candidates nominated, I performed the following acts:

I mailed to the Judge of Probate of Bibb County a Certificate of Mass Meeting ("certificate") signed by NDPA County Chairman Earwin Lockett filing NDPA nominees for county office. This was mailed Air Mail, Special Delivery Certified Mail on September 4, 1968, and a return receipt was received indicating that it was delivered on September 5, 1968 (copy of certificate and return receipt are Attachment 1 hereto).

I mailed to the Judge of Probate of Colbert County a certificate signed by NDPA County Chairman Charlie Burgess filing NDPA nominees for county office. This was mailed Air Mail, Special Delivery, Certified Mail on September 4, 1968, and a return slip, though requested, has not been received (copy of certificate and receipt request record are Attachment 2 hereto).

I mailed to the Judge of Probate of Cullman County a certificate signed by NDPA County Chairman Sandra Nesmith filing NDPA nominees for county office. This was mailed Air Mail, Special Delivery, Certified Mail on September 4, 1968, and a return receipt was received indicating that it was delivered September 6, 1968 (copy of certificate and return slip are Attachment 3 hereto).

I mailed to the Judge of Probate of Etowah County a certificate signed by NDPA County Chairman Isaiah Hayes, III, filing NDPA candidates for county office. This was mailed Air Mail, Special Delivery, Certified Mail on September 4, 1968, and a return receipt was received, indicating that it was delivered on September 5, 1968 (copy of certificate and return receipt are Attachment 4 hereto).

I mailed to the Judge of Probate of Jefferson County a certificate signed by NDPA County Chairman and 6th District Chairman F. J. Zylman (myself), filing NDPA candidates for county office. I chaired the mass meeting, and the certificate correctly stated that said meeting held May 7, 1968 was also the meeting for the 6th District, which is fully contained within Jefferson County so that at the meeting, Thomas (Tommy) Wrenn was nominated for Congress in the 6th Congressional District of Alabama. This was mailed Air Mail, Special Delivery, Certified Mail on September 4, 1968, and a return receipt was received, indicating that it was delivered on September 5, 1968 (the attached certificate, a reproduction by my hand of that which was filed, and the return receipt are Attachment 5 hereto)

I mailed to the Judge of Probate of Lauderdale County a certificate signed by NDPA County Chairman James I. Barnett, filing NDPA candidates for county office. This was mailed Air Mail, Special Delivery, Certified Mail on September 4, 1968, and a return receipt was received, indicating that it was delivered on September 5, 1968 (copy of certificate and return receipt are Attachment 6 hereto).

I mailed to the Judge of Probate of Montgomery County a certificate signed by NDPA County Chairman James W. Flowers, filing NDPA candidates for county office. This was mailed Air Mail, Special Delivery, Certified Mail on September 4, 1968, and a return receipt was received, indicating that it was delivered on September 5, 1968 (copy of certificate [Alvin Holmes had withdrawn before the mailing and was stricken on the original] and return receipt are Attachment 7 hereto).

I mailed to the Judge of Probate of Morgan County a certificate signed by NDPA County Chairman

Garry H. Nungester, Jr., filing NDPA candidates for county office. This was mailed Air Mail, Special Delivery, Certified Mail on September 4, 1968, and a return receipt was received, indicating that it was received on September 5, 1968. I then received a letter from the Judge of Probate of Morgan County, T. C. Almon, questioning the certificate (a copy of the return receipt, his letter, and a copy of the certificate filed are Attachment 8 hereto).

I mailed to the Judge of Probate of St. Clair County a certificate signed by NDPA County Chairman J. H. Davis, filing NDPA candidates for county office. This was mailed Air Mail, Special Delivery, Certified Mail, on September 4, 1968, and a return receipt was received, indicating that it was delivered on September 5, 1968 (certificate and return receipt are Attachment 9 hereto).

I mailed to the Judge of Probate of Blount County a certificate signed by NDPA County Chairman J. Bains, filing the name of James Bains as a candidate for Congress in the 7th District. This was mailed Air Mail, Special Delivery, Certified Mail on September 4, 1968, and a return receipt was received, indicating that it was received on September 5, 1968 (certificate and return receipt are Attachment 10 hereto).

I mailed to the Judge of Probate of Greene County a certificate signed by NDPA County Chairman Peter J. Kirksey, filing candidates for county office and the name of William McKinley Branch for U.S. Congressman, 5th District. This was mailed on September 4, 1968, Air Mail, Special Delivery, Certified Mail, and a return receipt was received, indicating that it was delivered on September 5, 1968 (certificate and return receipt are Attachment 11 hereto).

[All certificates sent to Judges of Probate by me were notarized; some of the attached copies were made before the notarization.]

I mailed, Air Mail, Special Delivery on September 4, 1968, to NDPA County Chairmen listed below unsigned certificates received by me, recording, to the best of my knowledge, county meetings held on May 7, 1968, in their counties. Included was a memo from NDPA Chairman, Dr. John Cashin, a copy of which is Attachment 12 hereto. Listed below with the names of the County Chairmen are their county, the names of the candidates and the offices for which they were listed as nominated.

1. Mrs. Sallie Hadnott, Autauga County:

Miss Geraldine Hadnott, Board of Education, #1.

Mrs. Marzell Rawlinson, Board of Education, #2.

Dan Houser, Board of Revenue & Control, #1.

Mrs. Sallie Hadnott, Board of Revenue & Control #2.

Willie L. Wood, Board of Revenue & Control, #3.

Mrs. Susie W. Peagler, Board of Revenue & Control #4.

Willie J. Smith, County Superintendent of Education.

2. J. B. Newman, Henry County: James Malone, Board of Education.

3. William Harrison, Lee County: Albert Neasley, Justice of the Peace, Beat #2, Place 1.

4. Robert L. Strickland, Lowndes County:

Robert L. Strickland, Board of Revenue #1.

Jesse W. Farar, Board of Revenue #2.

Corey S. Whitney, Board of Revenue #3.

Jessie L. Johnson, Board of Revenue #4.

Sidney Logan, Jr., Board of Revenue #5.
Mrs. Rosa Lee Mallard, Board of Education #1.
William J. Cosby, Board of Education #2.
Mrs. Lillian S. McGill, Superintendent of Education.

5. Rev. E. N. Palmer, Dale County: John Henry Howard, County Commissioner #2.

6. Dr. Sullivan Jackson, Dallas County:
Dr. Sullivan Jackson, Board of Education #1.
Mrs. Marie P. Foster, Board of Education #2.

7. Sheriff Lucius Amerson, Macon County:
P. Campbell, County Commissioner #2.
Otis Pinkard, Board of Revenue #4.

8. Anne Braxton, Marengo County:
Mannel Coleman, Board of Revenue.
Fred Holmes, Board of Revenue.

9. Rev. F. N. Nixon, Sumter County:
Samuel Little, Chairman, Board of Education.
Robert Cork, Jr., Member, Board of Education.
Richard Rowe, Constable, Beat 1.
F. N. Nixon, Constable, Beat 6.
Obie Wilson, Constable, Beat 18.
Alice Belle, Constable, Beat 18.
Lewis Thomas, Constable, Beat 19.
Bettie Wimbley, Justice of the Peace, Beat 1.
John Hoad, Justice of the Peace, Beat 11.
Connie L. Ruffin, Justice of the Peace, Beat 18.
Annie B. Williams, Justice of the Peace, Beat 19.
Tessie Thomas, Justice of the Peace, Beat 19.

By telephone, I supplied to Attorney Orzell Billingsley the names of County Chairman, counties, candidates and offices for the counties below listed. He informed me that he notified these chairmen and

provided them with all the necessary information for filing candidates in their counties.

1. Peter J. Kirksey, Greene County:
   Vassie Knolt, County Commissioner No. 1.
   Harry C. Means, County Commissioner No. 2.
   Levi Morrow, Sr., County Commissioner No. 3.
   Frenchie Burton, County Commissioner No. 4.
   Robert Hines, Board of Education No. 1.
   James A. Posey, Board of Education No. 2.
2. Joseph Malisham, Tuscaloosa County:
   Maxie Thomas, Tax Assessor.
   Dr. Henry J. Savery, Board of Education No. 1.
   Marion E. Newson, Board of Education No. 2.
   Thomas Jefferson, Constable, Beat 16.
   Charles R. Crawford, Constable, Beat —.
   Roderick Dugliss, Board of Revenue No. 1.
   Joaquin C. Ruhn, Board of Revenue No. 2.
   Marc A. Frauenfelder, Board of Revenue No. 3.
   Milton C. Washington, Justice of the Peace No. 15.

I am informed and believe that the following has taken place: that, in Dale County, no certificate was filed; that in Dallas County the certificate would be filed on September 11, 1968; that, in Macon County, no certificate would be filed; that, in Marengo County, Anne Braxton, NDPA County Chairman, filed a correct slate of candidates on September 5, 1968, my list being erroneous; that, in Sumter County, the certificate was filed the evening of September 5, 1968, at the home of the Judge of Probate; that, in Greene County, Chairman Peter J. Kirksey did file on or about September 4, 1968, a certificate; that, in Pickens County, no certificate was filed; that, in Tuscaloosa County, a certificate was filed on September 4, 1968, by Joseph Malisham; and that, in Autauga County,

County Chairman Mrs. Sallie Hadnott, finding the Judge of Probate absent from his office on September 5, 1968, placed her certificate in the mail to him.

The candidates filed in Marengo County by Annie Braxton are, according to her, as follows:

T. R. Hayes, Justice of the Peace, Magnolia.
R. T. Hayes, Justice of the Peace, Magnolia.
Oscar Hildreth, Justice of the Peace, Wayne.
Arthur Woods, Justice of the Peace, Faunsdale.
Hillie Belcher, Justice of the Peace, Faunsdale.
James M. Harper, Justice of the Peace, Pineville.
William McKinley Branch, U.S. Congressman, District 5.

She said that the County Mass Meeting was held on May 7, 1968, at 12:15 p.m., at the County Courthouse.

Further deponent sayeth not.

/s/ F. J. ZYLMAN.

Sworn to and subscribed before me at Atlanta, Georgia this 11th day of September, 1968.

[SEAL] /s/ NANCY M. GUERRERO.
Notary Public, Georgia,
State at Large.

My Commission Expires April 21, 1972.

APPENDIX C

In the United States District Court for the Middle District of Alabama (Northern Division)

Civil Action No. 2757–N

SALLIE M. HADNOTT; REVEREND WILLIAM MCKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR. AND THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, A CORPORATION FOR THEMSELVES JOINTLY AND SEVERALLY, AND FOR ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

MABEL S. AMOS, AS SECRETARY OF STATE OF THE STATE OF ALABAMA; EDWARD A. GROUBY, AS JUDGE OF PROBATE FOR AUTAUGA COUNTY, ALABAMA; AND ALL OTHER JUDGES OF PROBATE OF THE STATE OF ALABAMA, JOINTLY AND SEVERALLY, WHO ARE SIMILARLY SITUATED; ALBERT BREWER, AS GOVERNOR OF THE STATE OF ALABAMA; MACDONALD GALLION, AS ATTORNEY GENERAL OF THE STATE OF ALABAMA, AND THEIR SUCCESSORS IN EACH OFFICE, DEFENDANTS

TEMPORARY RESTRAINING ORDER

A three-judge court has been convened in this case pursuant to 28 U.S.C.A. § 2281. The motion of plaintiffs for a temporary restraining order has been submitted on plaintiffs' said motion, the verified complaint and affidavits and exhibits attached thereto, and oral argument by counsel for plaintiffs and by Assistant Attorneys General of Alabama.

This case presents urgent and critical circumstances, involving issues of what persons are to be named on the ballot as candidates in the general election in Alabama on November 5, 1968. The court has, therefore, set the motion for preliminary injunction for hearing on September 30, 1968, a time as early as possible consistent with the necessities of preparation by the parties. The exigencies of printing ballots, mailing absentee ballots and other pre-election procedures, and of conduct of campaigns by candidates, in the short period of time before election day, November 5, present "difficult if not insurmountable practical problems"[1] should the plaintiffs be granted any substantial relief after the hearing set for September 30. The guide to a practicable solution to minimize the problems and protect the interests of all candidates and all voters insofar as it is possible to do so has been given by the Supreme Court of the United States in *Williams* v. *Rhodes, supra,* in an order entered September 10, 1968. A three-judge district court had refused to order the Secretary of State of the State of Ohio to put on the Ohio ballot the names of George C. Wallace, a candidate for President, and Marvin Griffin, a candidate for Vice President. Until it could hear and decide an appeal from that order the Supreme Court granted emergency interim relief to protect so far as practicable the rights of the candidates and the voters. Those who are before this court seeking places on the Alabama ballot, and the voters of Alabama who are entitled to consider voting for those candidates if they ultimately are granted places on the ballot, are entitled to like protection.

It is, therefore, ORDERED, ADJUDGED, and DECREED as follows:

---

[1] *Williams* v. *Rhodes*, Sup. Ct. of the United States, [Sept. 10, 1968].

1. The Honorable Mabel S. Amos, Secretary of State of the State of Alabama, shall prepare and issue to the Judges of Probate of all counties in Alabama a certification of the forms to be employed for official ballots to be used in the November, 1968 general election in Alabama. Such certification shall show that there is to be a column on the ballot for candidates of The National Democratic Party of Alabama.

2. The Secretary of State shall prepare and issue to the Judges of Probate of all counties in Alabama amended certifications covering the names of nominees and the offices for which nominated covering offices the candidates for which are required under Alabama law to be certified by the secretary of state to judges of probate. The amended certification shall show that the persons named on Schedule 1 hereto are nominees of The National Democratic Party of Alabama for the offices shown on Schedule 1 and are candidates for such offices under the name and emblem of said party.

3. With respect to the names of nominees and the offices for which nominated that are placed upon ballots by reasons other than certification by the Secretary of state, the names of the persons shown on Schedule 2 hereto as nominees of The National Democratic Party of Alabama shall be included by the Judges of Probate of the respective counties as candidates for the offices shown on Schedule 2 under the name and emblem of said party.

4. The Judge of Probate of each county using the voting machine process in whole or in part shall, to the extent applicable to the ballot in the particular county, include the aforesaid names as candidates in the printing of labels, programming of machines, and all other steps necessary to prepare such voting machines for the November, 1968, general election. The

Judges of Probate shall make such preparations that upon receipt of later instructions from the Secretary of State or from this court they can block out said names and be prepared to take such other steps as would be necessary to eliminate said names from the voting machine ballot should the judgment of this court provide for no, other, or different action from that specified herein.

5. On all official paper ballots and official absentee ballots which are prepared or printed pending the further orders of this court each Judge of Probate, to the extent applicable to the ballot in the particular county, shall include the above-described nominees of The National Democratic Party of Alabama as candidates under the name and emblem of said party. If official paper ballots or official absentee ballots already have been printed or prepared for use in any particular county on which the names of the above-described nominees do not appear as candidates they shall not be used, displayed or circulated pending the further orders of the court. All Judges of Probate shall take all such further action with respect to paper ballots, absentee ballots and absentee voting as may be necessary to insure that each county will be able to comply with any final judgment of this court relating to the claim of the nominees of The National Democratic Party of Alabama to places on the ballot as candidates in the November, 1968 general election.

6. The use of titles and nicknames of nominees is governed by the laws of the State of Alabama and not by the forms in which names appear on Schedules 1 and 2.

7. This order shall become effective upon the plaintiffs' furnishing a bond with acceptable sureties in the amount of $1000.00, for the payment of costs, and

will expire ten days from the date of its issuance, subject to extension by the court.

DONE this the 18th day of September, 1968.

/s/ JOHN C. GODBOLD,
United States Circuit Judge.

/s/ FRANK M. JOHNSON,
United States District Judge.

SCHEDULE 1

For United States Senator—Robert P. Schwenn
For President Public Service Commission—John Henry Davis
For Presidential Elector, Place No. 1—E. D. Bouier
For Presidential Elector, Place No. 2—Rev. William McKinley Branch
For Presidential Elector, Place No. 3—Mrs. Virginia Durr
For Presidential Elector, Place No. 4—R. E. Cordray
For Presidential Elector, Place No. 5—J. H. Davis
For Presidential Elector, Place No. 6—George De-Boer
For Presidential Elector, Place No. 7—Jack Drake
For Presidential Elector, Place No. 8—Billy Joe Robinson
For Presidential Elector, Place No. 9—Robert Schwenn
For Presidential Elector, Place No. 10—James Williams
For Representative in Congress from 1st Congressional District—Noble Beasley
For Representative in Congress from 2nd Congressional District—Rev. Richard Boone
For Representative in Congress from 3rd Congressional District—Wilbur Johnston
For Representative in Congress from 4th Congressional District—T. J. Clemons

For Representative in Congress from 5th Congressional District—Rev. William McKinley Branch
For Representative in Congress from 6th Congressional District—Thomas Wrenn
For Representative in Congress from 7th Congressional District—James Bains
For Representative in Congress from 8th Congressional District—Charlie Burgess
For Representative in the Alabama House of Representatives from Madison County District 3, Place No. 2—Myrna Copeland

SCHEDULE 2

Counties

Autauga:
Board of Education, Dist. 1, Miss Geraldine Hadnott
Board of Education, Dist. 2, Mrs. Marsell Rawlinson
Board of Revenue & Control, Dist. 1, Mrs. Sallie Hadnott

Colbert:
Superintendent of Education, Charles L. Carter
Board of Education, Place No. 2, Charles Burt
Board of Revenue, NE Dist., Rev. George Smith
Board of Revenue, NW Dist., Leon Fuqua

Cullman: Chairman, Board of Revenue, Frances Gammon

Dallas:
Board of Education, Place 1, Dr. Sullivan Jackson
Board of Education, Place 2, Mrs. Marie P. Fosr

Etowah:

Board of Education, Place 1, W. S. Alaxander
Board of Revenue, Dist. 1, Jimmy Horton
Board of Revenue, Dist. 3, Booker T. Borden
Constable, K. J. Sullivan
Justice of the Peace, Beat No. 1, Patricia McAlpin
Justice of the Peace, Beat No. 1, Floyd Donald
Justice of the Peace, Beat No. 10, Earl Jerone King
Justice of the Peace, Beat No. 10, Joe Hill
Justice of the Peace, Beat No. 16, Aris Morris
Justice of the Peace, Beat No. 17, Isaiah Hayes III
Justice of the Peace, Beat No. 17, Willie Cylar

Greene:

County Commissioner, Place No. 1, Vassie Knott
County Commissioner, Place No. 2, Harry C. Means
County Commissioner, Place No. 3, Levi Morrow, Sr.
County Commissioner, Place No. 4, Frenchie Burton
Board of Education, Place No. 1, Robert Hines
Board of Education, Place No. 2, James A. Posey

Jefferson:

Board of Education, H. D. Coke
Board of Education, Mrs. Margaret P. Little

Lauderdale:

Board of Education, John H. Mayberry
Justice of the Peace, Beat No. 10, James C. Clay

Limestone: Board of Education, Dist. No. 1, E. D. Bouier

Madison: Board of Education, Dist. No. 5, James Henry Hicks

Marengo:
Justice of the Peace, Magnolia, T. R. Hayes
Justice of the Peace, Magnolia, R. T. Hayes
Justice of the Peace, Wayne, Oscar Hildreth
Justice of the Peace, Faunsdale, Arthur Woods
Justice of the Peace, Faunsdale, Hillie Belcher
Justice of the Peace, Pineville, James M. Harper

Montgomery:
County Board of Education, Henry Spears
County Board of Education, Orrelieus Christburg

Morgan:
Constable, Beat No. 1, Alphonso Pettus
Justice of the Peace, Beat 1, Garry Nungester

St. Clair:
Commissioner, Dist. 4, Henry H. Threatt
Judge of Inferior Court, Southern Div., James Truss
Member of Board of Education, Dist. 4, Place 3. J. H. Davis

Sumter:
Chairman, Board of Education, Place 1, Samuel Little
Member Board of Education, Place 2, Robert Cook, Jr.
Constable, Beat No. 1, Richard Rowe
Constable, Beat No. 6, F. N. Nixon
Constable, Beat No. 8, Alice Belle
Constable, Beat No. 18, Obie Wilson
Constable, Beat No. 19, Lewis Thomas
Justice of the Peace, Beat No. 1, Bettie Wimbly
Justice of the Peace, Beat No. 11, John Hoard
Justice of the Peace, Beat No. 18, Connie Ruffin
Justice of the Peace, Beat No. 19, Tessie Thomas
Justice of the Peace, Beat No. 19, Annie B. Williams

Tuscaloosa:

Tax Assessor, Maxie Thomas

Board of Education, Dist. No. 1, Dr. Henry W. Savery

Board of Education, Dist. No. 2, Marion E. Newsom

Constable, Beat No. 16, Thomas Jefferson

Constable, Beat No. 13, Charles R. Crawford

Board of Revenue, Dist. No. 1, Roderick Dugliss

Board of Revenue, Dist. No. 2, Joaquin G. Kuhn

Board of Revenue, Dist. No. 3, Marc A. Frauenfelder

Justice of the Peace, Beat No. 13, Milton C. Washington

Wilcox: Board of Education, Dist. No. 2, Benjamin Thompson

APPENDIX D

In the United States District Court for the Middle District of Alabama, Northern Division

Civil Action No. 2757–N

SALLIE M. HADNOTT; REVEREND WILLIAM MCKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR. AND THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, A CORPORATION FOR THEMSELVES JOINTLY AND SEVERALLY, AND FOR ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

vs.

MABEL S. AMOS, AS SECRETARY OF THE STATE OF ALABAMA; EDWARD A. GROUBY, AS JUDGE OF PROBATE FOR AUTAUGA COUNTY, ALABAMA; AND ALL OTHER JUDGES OF PROBATE OF THE STATE OF ALABAMA, JOINTLY AND SEVERALLY, WHO ARE SIMILARLY SITUATED; ALBERT BREWER, AS GOVERNOR OF THE STATE OF ALABAMA; MACDONALD GALLION, AS ATTORNEY GENERAL OF THE STATE OF ALABAMA, AND THEIR SUCCESSORS IN EACH OFFICE, DEFENDANTS

ANSWER TO COMPLAINT

Comes now the defendants in the above styled cause, by and through their attorneys of record, and answer the complaint, as last amended, as follows:

1. This court is without jurisdiction to decide the points in issue in this case in that each and every question of fact and of law raised by the complaint are questions which should be reserved to the exclu-

sive jurisdiction of the courts of the State of Alabama.

2. This court is without jurisdiction to decide the questions of laws presented by this suit in that each such question is a question of state law exclusively and must be decided by the courts of the State of Alabama.

3. Plaintiffs have no standing in this suit in that there is no diversity of citizenship between the parties, there is no amount of money in controversy, and no substantial federal Constitutional questions are raised in said Complaint.

4. Defendants deny each and every allegation of the said Complaint, as last amended, and demand strict proof of each and every allegation as to each defendant separately and severally.

5. Plaintiffs have no standing in this Court in that they have failed to exhaust their available State remedies, in that the Courts of the State of Alabama have been at all times open and available to them and they have failed to follow the remedies available to them under the laws of the State of Alabama.

6. Nominees of the National Democratic Party of Alabama (hereinafter referred to as "NDPA") listed in Schedule 1. of the Complaint as last amended, and as adopted by and listed in the Temporary Restraining Order of this Court dated September 18, 1968 in this cause, also designated as Schedule 1., are each and every one disqualified from being placed upon the ballot in the general election of November 5, 1968 in Alabama, in that each said nominee of NDPA failed to file with the Secretary of State, within five days after being nominated at an alleged mass meeting or convention, a statement designating himself or showing the name of not less than one or more than five persons elected to receive, expend,

audit, and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate as required by Title 17, Section 274 and 275, Code of Alabama 1940, Recompiled 1958, and therefore should be found by this Court to be so disqualified.

7. The following named nominees of NDPA as listed on Schedule 1 of the Temporary Restraining Order of this Court, are disqualified from being placed upon the ballot in the general election of November 5, 1968 in Alabama, and should be ordered so stricken from the order of the Court and disqualified as nominees, in that each has failed to file with the Secretary of State a Declaration of Intention to become a candidate for the respective offices hereinafter listed, in violation of Act No. 243, Acts of Alabama 1967, Special Session (hereinafter referred to as the "Garrett Act"):

a. John Henry Davis—President, Public Service Commission.

b. E. D. Bouier—Presidential Elector, Place 1.

c. Rev. William McKinley Branch—Presidential Elector, Place 2.

d. Mrs. Virginia Durr—Presidential Elector, Place 3.

e. George DeBoer—Presidential Elector, Place 6.

f. Jack Drake—Presidential Elector, Place 7.

g. Billy Joe Robinson—Presidential Elector, Place 8.

h. Noble Beasley—Representative in Congress from 1st Congressional District.

i. Wilbur Johnston—Representative in Congress from 3rd Congressional District.

j. Thomas Wrenn—Representative in Congress from 6th Congressional District.

k. James Bains—Representative in Congress from 7th Congressional District.

l. Charlie Burgess—Representative in Congress from 8th Congressional District.

m. Myrna Copeland—Alabama House of Representatives from Madison County, District 3, Place No. 2.

8. Each of the nominees of the NDPA, listed immediately above in paragraph No. 7. of this Answer, a. through m. inclusive, are disqualified from being placed upon the ballot in the general election of November 5, 1968 in Alabama, and should be so ordered disqualified by further order of this Court, in that each and every said nominee has failed to file with the Secretary of State of Alabama, at any time, a statement designating a person or committee to handle campaign funds as required by Title 17, Sections 274 and 275, Code of Alabama, supra.

9. Each nominee of the NPDA listed below is disqualified as a candidate for the respective offices listed in Schedule 1. of the Temporary Restraining Order, and should be so ordered by this Court as being disqualified from being placed on the general election ballot in Alabama in 1968, for that pursuant to Title 17, Section 153(1), Code of Alabama 1940, Recompiled 1958, each of these particular candidates are required to become a candidate for a numbered place or from a geographically numbered district, and after having filed Declarations of Intention to become candidates for certain numbered places (as hereinafter further described) each said nominee was later certified by the NDPA to the Secretary of State and to this Court (by the amendment to the Complaint) as candidates or nominees for other and different offices, numbered places or from other and different districts than spe-

cified in their said Declarations of Intent earlier filed; to wit:

a. R. E. Cordray filed a Declaration under the Garrett Act to become a candidate for Presidential Elector, *Place 1.*, but was certified to the Secretary of State and to this Court as a candidate for Presidential Elector, *Place 4.*

b. J. H. Davis filed such Declaration for Presidential Elector, *Place 4.*, but was certified, as aforesaid, for *Place 5.*

c. Robert Schwenn filed such Declaration for Presidential Elector, *Place 5.*, but was certified, as aforesaid, for *Place 9.*

d. James Williams filed such Declaration for Presidential Elector, *Place 2.*, but was later certified, as aforesaid, for *Place 10.* He has now requested his name stricken from the ballot (see attached copy of letter).

10. Title 17, Section 148, Code of Alabama 1940, Recompiled 1958, provides in part that, "The name of each candidate shall appear but one time on said ballot, and under only one emblem.", and therefore the following named nominees of the NDPA, listed in the Temporary Restraining Order of this Court, are disqualified from being placed on the general election ballot in Alabama in 1968, and should be so disqualified by order of this Court, in that they are in violation of Section 148, supra, as hereinafter set forth:

a. John Henry Davis and J. H. Davis, residing in St. Clair County in the City of Ashville, are one and the same person and has been certified to this Court by Complainants as the NDPA nominee for (1) President, Alabama Public Service Commission, (2) Presidential Elector, Place 5., and (3) Member of the Board of Education, District 4, Place 3., St. Clair County. [See attached Exhibits A and B, affidavits of

Judge H. B. Hamilton, and of Joe W. Watkins; also see stipulation to same effect by counsel for complainants, appearing in deposition of Honorable Mabel Amos.]

b. Robert P. Schwenn has been certified to this Court as a nominee of the NDPA for United States Senator, and also for Presidential Elector, Place 9., in violation of Section 148, supra.

c. Rev. William McKinley Branch is certified to this Court as the NDPA nominee for Presidential Elector, Place 2., and also for United States House of Representatives from the 4th Congressional District, in violation of Section 148, supra.

d. E. D. Bouier is certified to this Court as the NDPA nominee for Presidential Elector, Place 1., and also for the Limestone County Board of Education, District No. 1, in violation of Section 148, supra.

11. Defendants object to the placing on the several county ballots in the general election of 1968, certain nominees of the NDPA listed in Schedule 2., of the amendment to the complaint and in Schedule 2., of the Temporary Restraining Order of this Court, as hereinafter identified and for the reasons hereinafter specified, and pray that the Court so order that such nominees are disqualified:

a. Autauga County

(1) Complainants certified to this Court and to the Probate Judge of Autauga County the name of Dan Houser as the NDPA nominee for Board of Revenue and Control from District 1. Other candidates who resided in District 1. were certified for Districts 2., 3., and 4., and therefore failed to meet the residency requirements of the Alabama law, which was pointed out to Complainants and this Court in Defendants' letter dated September 17, 1968. Complainants there-

after amended their complaint and certification by omitting the name of Dan Houser for District 1., and substituting therefor the name of Mrs. Sallie Hadnott. Such substitution, obviously not being a clerical error, is a flagrant violation of the Alabama election laws in attempting to certify a person as a candidate after the final date set by law for certification, and for that it affirmatively appears that Mrs. Sallie Hadnott was not nominated in any mass meeting or convention for the office of Board of Revenue and Control, District 1., and therefore cannot become a nominee by action of complainants' attorney substituting her name for that of another nominee 12 days after the final date for certification set by law.

(2) All nominees of the NDPA for offices in Autauga County are disqualified in that they have failed to file statements with the Judge of Probate as required by Title 17, Sections 274 and 275, Code of Alabama 1940. [See attached Exhibit C.]

(3) All nominees of the NDPA for offices in Autauga County are disqualified in that no mass meeting was held on the first Tuesday in May, 1968 for the purpose of making such nominations as required by Title 17, Sections 413 and 414, Code of Alabama 1940. [See attached Exhibit D.]

(4) All nominees of the NDPA for offices in Autauga County are disqualified in that the names of such candidates were not certified in writing and filed with the Judge of Probate of said county not less than 60 days prior to the date of the general election of November 5, 1968 as required by Title 17, Section 145, Code of Alabama 1940. [See attached Exhibit E.]

b. Colbert County

(1) Charles L. Carter is disqualified from having his name placed on the ballot for Superintendent of

Education of Colbert County in that he has failed to have furnished to the Judge of Probate within the time specified by Alabama law, a certificate as to his educational qualifications and experience as required by Title 52, Sections 103 and 104, Code of Alabama 1940.

(2) Rev. George Smith was certified to this Court as being certified to the Probate Judge of Colbert County as a candidate for Board of Revenue, S.E. Dist., but failed to meet the residency requirements of the Alabama law in that he resides in the N.E. Dist. Attorney for Complainants has attempted to substitute districts and certify the said George Smith as a candidate for an office for which he was not nominated.

(3) Leon Fuqua is disqualified as a candidate for Board of Revenue of Colbert County, N.W. Dist., for that he was certified as a nominee for the S.W. Dist., in which he did not reside, and has not been nominated for said office from the N.W. District.

(4) All nominees for office in Colbert County specified in Schedule 2., of the Temporary Restraining Order are disqualified from having their names placed on the ballot in the general election of November 5, 1968 for that each nominee has failed to file with the Probate Judge of Colbert County a Declaration of Intention required by the Garrett Act and also have failed to file statements required by Title 17, Sections 274 and 275, Code of Alabama 1940. [See attached Exhibit F.]

c. Cullman County

Frances Gammon is disqualified as the nominee of the NDPA for Chairman, Board of Revenue of Cullman County in that he failed to file with the Probate Judge of said county a Declaration of Intent pursuant to the Garrett Act, and also for that he failed

to file the statement required by Title 17, Sections 274 and 275, Code of Alabama 1940, as hereinbefore described. [See attached Exhibit G.]

d. Dallas County

NDPA nominees T. J. Clemons, Dr. Sullivan Jackson, and Mrs. Marie Foster are disqualified from having their names on the general election ballot in Dallas County, and T. J. Clemons is disqualified from having his name appear on any ballot in the Fourth Congressional District, in that, while each complied with the Garrett Act, none of the said nominees were certified to the Judge of Probate of said county as having been nominated until September 17, 1968, which is less than 60 days prior to the date of the election and, therefore each is in violation of Title 17, Section 145, Code of Alabama 1940. [See attached Exhibit H-(D).]

e. Etowah County

(1) All nominees of the NDPA for offices in Etowah County are disqualified in that each failed to file Declarations of Intent as required by the Garrett Act, and also for the fact that each has failed to file with the Probate Judge of said county a statement naming a person or committee to handle campaign funds as required by Title 17, Sections 274 and 275, supra. [See attached Exhibit I.]

(2) NDPA nominee Jimmy Horton is disqualified in that he is certified as a candidate for Etowah County Board of Revenue, District 1., in which he resides, however, there is no vacancy in that position and such position is not up for election on November 5, 1968. [See attached Exhibits I-(B) and I-(C).]

(3) NDPA nominees K. J. Sullivan, Floyd Donald, Joe Hill and Willie Cylar have submitted resigna-

tions to the Probate Judge of said county for the respective offices listed on Schedule 2., of the Temporary Restraining Order, therefore this Court should remove those names from any further order if such order is issued. [See attached Exhibit I–(B).]

f. Greene County

(1) All NDPA nominees listed in Schedule 2., of the Temporary Restraining Order as candidates for office in Greene County are disqualified in that: (a) no mass meeting was held by said NDPA in Greene County on the first Tuesday in May, 1968 as required by law, (b) each of the said nominees have failed to file statements with the Probate Judge of said county as required by Title 17, Sections 274 and 275, supra, (c) each nominee certified to the Judge of Probate and to this Court for an office in Greene County have failed to comply with the Garrett Act. [See attached Exhibits J, K, and L.]

(2) Rev. William McKinley Branch is disqualified from being placed on the general election ballot in Greene County and in each and every county in the 5th Congressional District, for that: (a) he failed to file a Declaration of Intent with the Probate Judge of Greene County, and as a candidate for a district office he is required by law to file such Declaration with the Probate Judge of each county in the district; (b) he has failed to file a statement with the said Judge of Probate as required by Title 17, Sections 274 and 275, supra. [See attached Exhibits, J. K, and L.]

g. Jefferson County

All NDPA nominees for office in Jefferson County or in the Sixth Congressional District are disqualified from having their names placed on the general election ballot in Alabama in 1968, in that, (1) no mass meeting was held for the purpose of nominations on

the first Tuesday in May, 1968 as required by law; (2) each candidate for a county office and for a district office failed to file with the Probate Judge of Jefferson County a Declaration of Intention required by the Garrett Act; (3) each said nominee failed to file a statement with the said Probate Judge required by Title 17, Sections 274 and 275, supra; (4) more specifically, Thomas Wrenn, failed to file the above mentioned statements and declarations with each judge of probate in the Sixth Congressional District, in that such district encompasses part of Jefferson County, and he failed to file such statements with the Probate Judge of said county and is therefore disqualified as a nominee for the United States House of Representatives from said district. [See attached Exhibits M, N, N-(A), N-(B).]

h. Lauderdale County

Each nominee of the NDPA for office in Lauderdale County is disqualified in that the law requires that such candidates run by place number, and said nominees failed to become certified by place number, and each said candidate or nominee is further disqualified for failure to file with the Judge of Probate of said county the statement relative to designating a person to handle campaign funds as required by Title 17, Sections 274 and 275, supra. [See attached Exhibit O.]

i. Limestone County

(1) NDPA nominee Charlie Burgess is disqualified from appearing on any ballot in the 8th Congressional District in that he has failed to file with the Judge of Probate of Limestone County, a county within the said Congressional District, a statement required under Title 17, Sections 274 and 275, Code of Alabama 1940, and for the further reason that he has

failed to file with said Probate Judge a Declaration of Intention required by the Garrett Act. [See attached Exhibits P, P-(A), P-(B).]

(2) NDPA nominee E. D. Bouier is further disqualified as a candidate for the office of Board of Education, District No. 1, in Limestone County, in that he filed a Declaration of Intent under the Garrett Act to become a candidate for *District No. 2,* and likewise filed the statement required by Title 17, Sections 274 and 275, for *District No. 2.* No nomination has been received by the Judge of Probate from the NDPA for Board of Education, *District No. 1.* [See attached Exhibits P, P-(A), P-(B).]

j. Montgomery County

Nominees of the NDPA, Henry Spears and Orrelieus Christburg are disqualified as candidates for Board of Revenue in that they failed to file qualifying papers with the Judge of Probate of Montgomery County for numbered places or districts as required by Act No. 222, Local Acts of Alabama, 1939, p. 125, and have not been certified to this Court for numbered places.

k. Morgan County

All nominees of the NDPA for offices in Morgan County are disqualified in that each failed to file a Declaration of Intention to become a candidate with the Judge of Probate of said county as required by the Garrett Act, and for the further reason that each said nominee has failed to file with said Probate Judge the statement concerning campaign finances as required by Title 17, Sections 274 and 275, supra. [See attached Exhibits Q and Q-(A).]

l. St. Clair County

(1) NDPA nominee J. H. Davis, also known as John Henry Davis, is disqualified in that he has filed

for three offices or places on the ballot under the same party emblem in violation of Title 17, Section 148, Code of Alabama 1940, as hereinbefore further described.

(2) All nominees of the NDPA for offices in St. Clair County are disqualified in that each has failed to file Declarations of Intention to become candidates with the said Probate Judge as required under the Garrett Act, and for the further reason that each has failed to file with the Judge of Probate the statement required by Title 17, Sections 274 and 275, supra. [See atfached Exhibits R and S.]

12. All NDPA nominees for county and district offices are disqualified in that each said nominee failed to file with each probate judge required by law, a statement appointing a person or committee to receive, expend, audit and dispense campaign funds, within five days from their nomination by any alleged county or district mass meeting, as required by Title 17, Sections 274 and 275, Code of Alabama 1940, Recompiled 1958. Defendants reserve such other and further grounds for disqualification of NDPA candidates as may appear from depositions or testimony taken in this cause.

The above premises considered, Defendants pray that this Court enter an order in favor of said Defendants: (1) dismissing the Complaint, (2) dissolving its Temporary Restraining Order, and further allowing Defendants to proceed to have ballots printed and distributed for the general election of November 5, 1968, in the State of Alabama with all nominees of the National Democratic Party of Alabama omitted therefrom, (3) that the Court refuse

jurisdiction of the said cause, and (4) that the costs of this case be taxed against the Complainants.

Respectfully submitted.

MACDONALD GALLION,
Attorney General of Alabama,
By: JOHN G. BOOKOUT,
Deputy Attorney General,
WILLIAM N. MCQUEEN,
Assistant Attorney General,
LESLIE HALL,
Assistant Attorney General,
GORDON MADISON,
Assistant Attorney General,
Attorneys for Defendants.

STATE OF ALABAMA,
Montgomery County:

Before me, a notary public in and for said state and county, personally appeared John G. Bookout, one of the attorneys for the defendants in the above cause, and upon first being duly sworn, deposes and says that he is informed and believes and upon such information and belief states that the matters presented in the foregoing Answer to Complaint are true to his best knowledge, information and belief.

JOHN G. BOOKOUT.

Sworn to and subscribed before me, this the 25th day of September, 1968:

MARTHA G. INGRAM,
Notary Public.

I, John G. Bookout, as an Attorney of Record for Defendants, do hereby certify that I have mailed, properly addressed and postage prepaid, a copy of the foregoing Answer to Complaint to attorneys of record for Complaintants, Charles Morgan, Jr., and Orzelle Billingsley, Jr. on this the 25th day of September, 1968.

JOHN G. BOOKOUT.

829-701—69——7

APPENDIX E

On the dates set forth below, the following persons filed declarations of candidacy for nominations for offices in the May 7, 1968 Democratic primary election in Greene County and certified themselves as the individuals appointed to handle their campaign funds as required by the Corrupt Practices Act.

Name of candidate	Office sought	Date received by Office of Probate Judge
Vassie Knott	County Commissioner, District No. 1	February 20, 1968
Harry C. Means	County Commissioner, District No. 2	February 16, 1968
Levi Morrow, Sr.	County Commissioner, District No. 3	February 21, 1968
Frenchie Burton	County Commissioner, District No. 4	February 21, 1968
Robert Hines	Board of Education, Place No. 1	February 20, 1968
J. A. Posey	Board of Education, Place No. 2	February 21, 1968
G. D. Seale	County Commissioner, District No. 1	February 9, 1968
J. E. Henderson	County Commissioner, District No. 2	February 9, 1968
Homer E. Carpenter	County Commissioner, District No. 3	February 12, 1968
W. Herman Drummond	County Commissioner, District No. 4	February 10, 1968
Hugh Gould	Board of Education, Place No. 1	February 13, 1968
Richard Owens	Board of Education, Place No. 2	February 21, 1968

Attached is a copy of one of the forms filed by the candidates. Certified copies of the form filed by each candidate has been lodged with the Clerk of this Court.

QUALIFICATION BLANK

(DECLARATION OF CANDIDACY)

STATE OF ALABAMA,
County of Greene.

I hereby declare myself to be a candidate for the Democratic nomination (or election) in the Primary Elections to be held on Tuesday, the 7th day of May, 1968, and on Tuesday, the 4th day of June,

1968, for the office of County Commissioner for Greene (District, Circuit or *County*, if applicable), #1 (Place Number, if applicable).

I hereby certify that I am a Democrat, that I am a qualified elector of the State of Alabama; that I subscribe to the principles of the Democratic Party of Alabama; and that I possess the qualifications fixed by law for the office for which I am a candidate.

If I am a candidate for the Democratic nomination for Judge of a Court of Record, I do further certify that at the time of filing this Declaration of Candidacy I am not under disbarment or suspension.

I hereby certify and declare that I appoint myself (and hereby accept the appointment) as the sole and only person or committee to receive, expend, audit and disburse all monies contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting my nomination or election as such candidate for said office in accordance with Sections 274 and 275 of Title 17 of the Code of Alabama of 1950, as amended (Corrupt Practices Act).

Vassie Knott
(Signature of Candidate)

Route 1, Box 106–V
(Address)

Boligee, 35443
(City) (Zone)

Sworn to and subscribed before me on this 20 day of February, 1968, F. L. Jackson, Sr.
(Notary Public)

Please type or print your name as you wish it to appear on the ballot Vassie Knott

For instructions, see reverse side

INSTRUCTIONS

On or before Saturday, February 24, 1968, candidates for all offices, except County offices, are required to file this announcement of candidacy with and pay the entrance or qualifying assessment to:

Robert S. Vance, Chairman
State Democratic Executive Committee of Alabama
938 Frank Nelson Building
Birmingham, Alabama 35203

On or before Saturday, February 24, 1968, candidates for County offices are required to file this announcement of candidacy with and pay the entrance or qualifying assessment to the Chairman of the County Committee.

Entrance or Qualifying Assessments

Assessments as to *all offices except County offices* are as follows:

(a) Against each candidate for nomination for any remunerative office other than a County office, and except as otherwise herein provided, 2% of the salary of such office for the first year of the new term from every lawful source, including supplements from the Counties, for Circuit Judges and District Attorneys, but not including expense allowances to Circuit Judges, District Attorneys, United States Senators and Congressmen; and except that in cases of candidates for any remunerative office for an unexpired term, other than a county office, the amount to be paid shall be one-half of the amount which would be paid if said candidate were running for a full term.

(b) Against each candidate for National Committeeman or National Committeewoman, $100.00.

(c) Against each candidate for Elector, $50.00.

(d) Against each candidate for Delegate or Alternate Delegate to the Democratic National Convention, $25.00. Assessments for *County Office* will be fixed by the respective County Democratic Executive Committees.

Alabama Corrupt Practices Act

Within five days after filing this announcement of candidacy, candidates for State offices must file qualifications under the Corrupt Practices Act with the Secretary of State at Montgomery, Alabama, and candidates for County offices must file with the Probate Judge of their County. Candidates for a District or Circuit office must file with the Probate Judge of each County in such District or Circuit and should also file with the Secretary of State at Montgomery. (See Sections 274 and 278 of Title 17, Alabama Code of 1940, as amended.) A copy of this announcement of candidacy filed with the Secretary of State and Probate Judge(s) will meet the requirements of Section 274 of Title 17, Alabama Code of 1940, as amended, where the candidate himself (rather than a committee) intends to receive, disburse and report on all monies used in promoting his nomination or election.

For details concerning the itemized sworn statement required within thirty (30) days after the election, see Sections 279 and 280, Title 17, Alabama Code of 1940, as amended (found in the 1965 Pocket Parts to the Recompiled 1958 Code).

APPENDIX F

The following candidates in the May 7, 1968 Democratic Primary in Greene County Alabama filed statements of their campaign contributions and expenses on the dates indicated in accordance with the Corrupt Practices Act.

Name of Candidate	Office Sought	Date Received by Office of Probate Judge
Vassie Knott	County Commissioner, District No. 1	May 21, 1968
Harry C. Means	County Commissioner, District No. 2	Do.
Levi Morrow, Sr	County Commissioner, District No. 3	Do.
Frenchie Burton	County Commissioner, District No. 4	Do.
Robert Hines	Board of Education, Place No. 1	Do.
J. A. Posey, Sr	Board of Education, Place No. 2	Do.
G. D. Seale	County Commissioner, District No. 1	May 16, 1968
J. E. Henderson	County Commissioner, District No. 2	May 21, 1968
Homer E. Carpenter	County Commissioner, District No. 3	May 20, 1968
W. Herman Drummond	County Commissioner, District No. 4	May 17, 1968
Hugh Gould	Board of Education, Place No. 1	May 16, 1968
Richard Owens	Board of Education, Place No. 2	May 21, 1968

Attached is a sample copy of one of the statement forms filed by the candidates. Copies of the forms actually submitted by each candidate are on file with the Clerk of this Court.

EXPENSE ACCOUNT OF CANDIDATE

(To Be Filed Within 15 Days After the Primary Election)

Name: Vassie Knott
Mailing Address: Route 1, Box 106–V

Pursuant to Title 17, Sections 278, 279 and 400 of the Code of Alabama as amended by Acts No. 411 and

405, Regular Session, 1959, defining the Corrupt Practices Act, I herewith submit a full, correct, detailed and itemized statement of all expenses made directly or indirectly in sums over $5.00 and of all obligations, debts, or liabilities assumed or incurred at the time of filing this statement, together with the names of all contributors of amounts in excess of $10.00, with the amounts given by each, and a list of all gifts, loans or contributions made in connection with my campaign as a candidate in the Primary Election held on May 7, 1968, for the office of County Commissioner Place No. 1

(Enter Name of Office)

Contributions	$95.40
Total	95.40
Expenses Incurred:	
Literature	$40.40
Transportation	55.00
Total	95.40

STATE OF ALABAMA
County of Greene.

I, Geneva L. Mattison a Notary Public in and for said county in said state, hereby certify that Vassie Knott whose name is signed to the foregoing statement, who is known to me, he personally appeared before me on this day and being first duly sworn deposes and says that the statement hereinabove made is in all respects truse, and that the same is a full and detailed statement of all monies, securities or equivalents for money coming under the control or custody of said committee and by it expended directly or indirectly.

VASSIE KNOTT.
(Signature of Candidate)

Sworn to and subscribed before me this May 21, 1968.

GENEVA L. MATTISON
(Notary Public)

Act No. 405 (Regular Session, 1959), S. 113—
Andrews

AN ACT To amend Section 400 of Title 17, Code of Alabama (1940), which requires candidates in primary elections to file statements of campaign expenditures

Be It Enacted by the Legislature of Alabama:

Section 1. Section 400 of Title 17, Code of Alabama (1940), is amended to read as follows:

"Section 400. Expense account of candidate must be made and filed.—Any candidate for any office elected by the votes of more than one county, except candidates for the office of state senate, shall file with the secretary of state, and every candidate for a county office and candidates for the state senate and house of representatives shall file with the judge of probate of the county or counties in which said election is held, a sworn statement, setting out and itemizing the expenses of his canvass in such election within fifteen days after such election, and any candidate who fails to so file and swear to such statement within said time, shall be guilty of a misdemeanor, and, on conviction, must be fined not less than one hundred nor more than one thousand dollars."

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APPENDIX G

The following candidates for office in the November 5, 1968 general election in Greene County, Alabama filed statements of their campaign contributions and expenses within thirty days after the general election in accordance with the Corrupt Practices Act.

Name of candidate	Office sought	Date received by Office of Probate Judge
Vassie Knott	County Commissioner, District No. 1	December 5, 1968
Harry C. Means	County Commissioner, District No. 2	December 4, 1968
Levi Morrow, Sr	County Commissioner, District No. 3	December 2, 1968
Frenghie Burton	County Commissioner, District No. 4	December 3, 1968
Robert Hines	Board of Education, Place No. 1	November 15, 1968
J. A. Posey, Sr	Board of Education, Place No. 2	November 18, 1968
G. D. Seale	County Commissioner, District No. 1	November 12, 1968
J. E. Henderson	County Commissioner, District No. 2	November 13, 1968
Homer E. Carpenter	County Commissioner, District No. 3	November 13, 1968
W. Herman Drummond	County Commissioner, District No. 4	November 15, 1968.
Hugh Gould	Board of Education, Place No. 1	November 13, 1968
Richard Owens	Board of Education, Place No. 2	November 14, 1968

Attached is a sample copy of the statement forms filed by the candidates. Copies of the forms actually submitted by each candidate are on file with this Court.

STATEMENT OF CAMPAIGN INCOME AND DISBURSEMENTS

This statement is filed on behalf of the candidacy of Vassie Knott for the office of County Commissioner, Greene Co. in the November 5, 1968 General Election.

All expenditures, including debts and liabilities incurred, made directly or indirectly, in excess of $5.00 are:

To whom paid	Nature of item	By whom service performed	Purpose of expense	Amount
Gas station	Gas and oil	Texaco Service	Travel	41.26
Gas station	Antifreeze	Texaco Service	Travel	4.00
(a) Total				45.26
(b) In addition, various expenditures, each in the amount of $5.00 or less, were made in the total amount of				
(c) Total expenditures and liabilities, (a) plus (b)				

The following persons contributed in excess of $10.00 each:

Name of contributor	Amount
Green Co. Civic Association	45.26
(d) Total	
(e) In addition, various contributions, each in the amount of $10.00 or less were received in the total amount of	
(f) Total contributions	45.26

AFFIDAVIT

STATE OF ALABAMA,
County of Greene.

I swear that the foregoing statement of Campaign Income and Disbursements is in all respects true and it is a full and detailed statement of all moneys, securities, or equivalents for money coming under the control or custody of the committee to receive, expend, audit and disburse money or funds contributed and by them expended directly or indirectly.

_____,

Treasurer of committee or, if candidate himself has been appointed as the committee, the candidate.

Subscribed and sworn before me this 27th day of Nov., 1968.

F. L. JACKSON,
Notary Public.

AFFIDAVIT OF CANDIDATE

(to be signed if above affidavit signed by person other than candidate)

STATE OF ALABAMA,
County of Greene.

I swear that the foregoing statement is, to the best of my knowledge and belief, in all respects true, and that I have not in person made any expenditures or received any contributions which are not set forth and covered by said statement.

VASSIE KNOTT,
Candidate.

Subscribed and sworn before me this 27th day of Nov., 1968.

F. L. JACKSON,
Notary Public.

APPENDIX H

In the District Court of the United States for the Middle District of Alabama, Northern Division

Civil Action No. 2757–N

SALLIE M. HADNOTT, ET AL., PLAINTIFFS,

UNITED STATES OF AMERICA, AMICUS CURIAE AND PARTY

vs.

MABEL S. AMOS, ET AL., DEFENDANTS

ORDER

In order that a determination can be made of the exact number of votes cast by placing an "X" under the emblem of the National Democratic Party of Alabama in the Greene County, Alabama General Election of November 5, 1968, and on motion of the United States, it is ORDERED and ADJUDGED that the defendants J. Dennis Herndon, Judge of Probate; William E. Lee, Sheriff; and Mary C. Yarbrough, Circuit Clerk, open the ballot boxes used on November 5, 1968, in the presence of an attorney representing the United States, and count the number of ballots cast by placing an "X" under the emblem of the National Democratic Party of Alabama. No ballot is to be counted if any other "X" appears on it beside the name of any candidate or under the emblem of any party other than the National Democratic Party of Alabama.

The time of opening the boxes and counting the ballots will be at a time prior to December 20, 1968, agreeable to the defendants Herndon, Lee and Yarbrough, and the attorney for the Department of Justice.

The defendants Herndon, Lee and Yarbrough will be prepared to present a tally of the straight votes cast under the NDPA emblem to this Court on December 20, 1968 at 9:30 a.m.

The Clerk is DIRECTED to place sufficient copies of this order in the hands of the United States Marshal in order that each of the defendants, Herndon, Lee, and Yarbrough may be served with a copy. The Clerk is also directed to deliver a copy by mail to defendants, G. B. Seale, J. E. Henderson, Homer E. Carpenter, Herman Drummond, Hugh Gould and Richard Owens.

DONE this the 17th day of December, 1968.

/s/ JOHN C. GODBOLD,
Circuit Judge.

/s/ FRANK M. JOHNSON, JR.,
District Judge.

APPENDIX I

In the District Court of the United States for the Middle District of Alabama, Northern Division

Civil Action No. 2757-N

SALLIE M. HADNOTT, ET AL., PLAINTIFFS,
UNITED STATES OF AMERICA, AMICUS CURIAE AND PARTY

vs.

MABEL S. AMOS, ET AL., DEFENDANTS

REPORT TO THE COURT

In an order dated December 17, 1968, this Court instructed the defendants, J. Dennis Herndon, Judge of Probate; William E. Lee, Sheriff of Greene County; and Mary C. Yarbrough, Circuit Clerk, to open the ballot boxes used in the Greene County General Elections, 1968, in the presence of an attorney representing the United States; and to count the number of ballots cast by placing an "X" under the emblem of the National Democratic Party of Alabama.

On December 20, 1968, pursuant to said order, the defendants Herndon, Lee and Yarbrough, and their agents did open said ballot boxes in the presence of John T. Nixon, an attorney representing the United States, and did count the ballots in accordance with the order of this Court. The results of this count are as follows:

Number of ballots marked with an "X" under the emblem of the NDPA, but no other marks under any other emblem or beside any any candidate's name	1,938
All other ballots	2,180
Total	4,118

DONE this the —— day of December, 1968.

HUBBARD AND WALDROP,

By ——— ———,

Attorneys for Defendants, James Dennis Herndon, Mary C. Yarbrough, and William E. Lee.

CERTIFICATION

I, John T. Nixon, an attorney of record in this case for the United States, do hereby certify that I was present at all times on December 20, 1968, during the counting of the ballots used in the November 5, 1968, Greene County General Elections, and that the results reported above are true and accurate to the best of my knowledge.

DATED this the 20th day of December, 1968.

JOHN T. NIXON,

Attorney, U.S. Department of Justice.

APPENDIX J

In the District Court of the United States, for the Middle District of Alabama, Northern Division

Civil Action No. 2757–N

SALLIE M. HADNOTT, ET AL., PLAINTIFFS

UNITED STATES OF AMERICA AMICUS CURIAE AND PARTY

vs.

MABEL S. AMOS, ET AL., DEFENDANTS

ORDER

The court having considered the Motion for order to show cause submitted by the United States and having further considered the Response and Answer of the Defendants, J. Dennis Herndon, Judge of Probate for Greene County, Alabama; William E. Lee, Sheriff of Greene County, Alabama; Mary C. Yarbrough, Circuit Clerk of Greene County, Alabama; G. D. Seale, J. E. Henderson, Homer E. Carpenter, W. Herman Drummond, Hugh Gould and Richard Owens, and said Defendants having consented in said Response that the temporary relief therein prayed be granted to preserve the status quo pending a final determination of this cause, it appears to the court that said temporary relief should be granted and that the hearing of this cause upon the Motion for order to show cause and for temporary relief is unnecessary and should be abandoned.

It is therefore considered ORDERED, ADJUDGED and DECREED by the court that the Defendants J. Dennis

Herndon, Judge of Probate for Greene County, Alabama; William E. Lee, Sheriff of Greene County, Alabama; Mary C. Yarbrough, Circuit Clerk of Greene County, Alabama; G. D. Seale, J. E. Henderson, Homer E. Carpenter, W. Herman Drummond, Hugh Gould and Richard Owens be and they are hereby enjoined and restrained, pending further order of this court, from acting upon or in any other way effectuating their election in the November 5, 1968, General Election in Greene County, as certified by the Defendants, Herndon, Yarbrough and Lee.

It is further ordered that the Defendant Mabel S. Amos, as Secretary of State of the state of Alabama be enjoined and restrained, pending further order of this court, from issuing a commission to G. D. Seale, J. E. Henderson, Homer E. Carpenter and W. Herman Drummond as commissioners of Greene County, Alabama.

It is further ordered that G. D. Seale, J. E. Henderson, Homer E. Carpenter, and W. Herman Drummond be and they are hereby enjoined and restrained, pending further order of this court, from taking the oath of office as commissioners of Greene County, Alabama, and from assuming and/or taking office as commissioners of Greene County, Alabama for the term for which they were purportedly elected in said General Election of November 5, 1968.

It is further ordered that the Defendants Hugh Gould and Richard Owens be, and they are hereby, enjoined and restrained, pending further order of this court, from taking the oath of office as members of the Board of Education of Greene County, Alabama and from assuming or taking office as members of such Board of Education for the term to which they were purportedly elected in the General Election of November 5, 1968.

It is further ordered that the Defendants William E. Lee and James Dennis Herndon be, and they are hereby ordered and directed to preserve, pending further order of this court all ballots cast in the Greene County General Election of November 5, 1968, and all tally sheets, certificates of results and other election stationery used in said election.

It is further ordered that the Defendants William E. Lee, and James Dennis Herndon, Mary C. Yarbrough, G. D. Seale, J. E. Henderson, Homer E. Carpenter, W. Herman Drummond, Hugh Gould, and Richard Owens be, and they are hereby ordered and directed to preserve pending further orders of this court, any letters, communications, or records of communication pertaining or relating to said General Election of November 5, 1968, or to this case.

DONE AND ORDERED this 20th day of December, 1968.

/s/ JOHN C. GODBOLD,
United States Circuit Judge.

/s/ FRANK M. JOHNSON, JR.,
United States District Judge.

/s/ VIRGIL PITTMAN,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1969

APPENDIX K

Official Ballot, General Election, November 5, 1968

GREENE COUNTY

Names Of Offices To Be Voted For	ALABAMA INDEPENDENT DEMOCRATIC PARTY	AMERICAN INDEPENDENT PARTY OF ALABAMA	DEMOCRATIC PARTY	PROHIBITION PARTY	REPUBLICAN PARTY	THE ALABAMA CONSERVATIVE PARTY	THE NATIONAL DEMOCRATIC PARTY OF ALABAMA	INDEPENDENT	INDEPE
For United States Senator—Vote for One	( )	( )	( ) Jim Allen	( )	( ) Perry Hooper	( )	( ) Robert P. Schwenn	( )	( )
For Associate Justice Supreme Court, Place No. 1—Vote for One	( )	( )	( ) James S. Coleman	( )	( )	( )	( )	( )	( )
For Associate Justice Supreme Court, Place No. 2—Vote for One	( )	( )	( ) Robert B. Harwood	( )	( )	( )	( )	( )	( )
For Associate Justice Supreme Court—Unexpired Term—Vote for One	( )	( )	( ) James N. Bloodworth	( )	( )	( )	( )	( )	( )
For Presidential Public Service Commission—Vote for One	( )	( )	( ) Eugene (Bull) Connor	( )	( ) Fred R. Jones	( )	( ) John Henry Davis	( )	( )
For Presidential Elector, Place No. 1—Vote for One	( ) Ben F. Ray	( )	( ) Earl Morgan	( ) Mrs. Phoebe Cary Shoemaker	( ) M. J. Lyons, Jr.	( )	( ) E. D. Bouler	( )	( )
For Presidential Elector, Place No. 2—Vote for One	( ) Charles A. Bentley, Jr.	( ) Aaron C. Edwards	( ) Mabel S. Amos	( ) Mrs. J. E. Dillard	( ) James C. Van Antwerp, Jr.	( )	( ) William McKinley Branch	( )	( )
For Presidential Elector, Place No. 3—Vote for One	( ) Lafayette Patterson	( )	( ) MacDonald Gallion	( ) Mrs. Bertha Wallis Lee	( ) Paul Lowery	( )	( ) Mrs. Virginia Durr	( )	( )
For Presidential Elector, Place No. 4—Vote for One	( ) Roy D. McCord	( ) Ronald L. Pankey	( ) Mrs. Armistead Selden	( ) Mrs. Daisy Williams	( ) William H. Graham	( )	( ) R. E. Cordray	( )	( )
For Presidential Elector, Place No. 5—Vote for One	( ) Dot Little	( )	( ) Mrs. Jim Allen	( ) D. N. Stephenson	( ) Hult Sullivan	( )	( ) J. H. Davis	( )	( )
For Presidential Elector, Place No. 6—Vote for One	( ) Coleman A. Lollar, Jr.	( ) Bernice H. Morrison	( ) Richard (Dick) Beard	( ) Jerome B. Couch	( ) Robert D. Wilkinson, Jr.	( )	( ) George DeBoer	( )	( )
For Presidential Elector, Place No. 7—Vote for One	( ) Isom Clemon	( )	( ) Frank Mizell	( ) Ogburn A. Gardner	( ) Lee Clyde Traylor	( )	( ) Jack Drake	( )	( )
For Presidential Elector, Place No. 8—Vote for One	( ) James McArthur Reed	( )	( ) Albert Brewer	( ) Mrs. Lois Goodwin	( ) J. Smith Lanier, II	( )	( ) Billy Joe Robinson	( )	( )
For Presidential Elector, Place No. 9—Vote for One	( ) J. E. Brantley	( ) Steve E. Nation	( ) Mrs. Agnes Baggett	( ) Fred M. Burns	( ) Robert H. Maxwell	( )	( ) Robert Schwenn	( )	( )
For Presidential Elector, Place No. 10—Vote for One	( ) Joe L. Reed	( )	( ) Ernest Stone	( ) Mrs. Beulah K. Gray	( ) George Howard Young	( )	( ) James Williams	( )	( )
For Representative in Congress from 5th Congressional District—Vote for One	( )	( )	( ) Walter Flowers	( )	( ) Frank W. Donaldson	( ) W. C. (Chad) Gibbs	( ) William McKinley Branch	rd Eugene ney	( ) Mike
For County Commissioner, District No. 1—Vote for One	( )	( )	( ) G. D. Seale	( )	( )	( )	( )	( )	( )
For County Commissioner, District No. 2—Vote for One	( )	( )	( ) J. E. Henderson	( )	( )	( )	( )	( )	( )
For County Commissioner, District No. 3—Vote for One	( )	( )	( ) Homer E. Carpenter	( )	( )	( )	( )	( )	( )
For County Commissioner, District No. 4—Vote for One	( )	( )	( ) W. Herman Drummond	( )	( )	( )	( )	( )	( )
For Greene County Board of Education, Place No. 1—Vote for One	( )	( )	( ) Hugh Gould	( )	( )	( )	( )	( )	( )
For Greene County Board of Education, Place No. 2—Vote for One	( )	( )	( ) Richard Owens	( )	( )	( )	( )	( )	( )
For Tax Assessor—Vote for One	( )	( )	( ) M. A. (Aduston) Cook	( )	( )	( )	( )	( )	( )

APPENDIX K

Official Ballot, General Election, November 5, 1968

	ALABAMA INDEPENDENT DEMOCRATIC PARTY	AMERICAN INDEPENDENT PARTY OF ALABAMA	DEMOCRATIC PARTY	PROHIBITION PARTY	REPUBLICAN PARTY	THE ALABAMA CONSERVATIVE PARTY	THE NATIONAL DEMOCRATIC PARTY OF ALABAMA	INDEPENDENT	INDEPENDENT	FOR WRITE-IN
For One	( )	( )	( ) Jim Allen	( )	( ) Perry Hooper	( )	( ) Robert P. Schwenn	( )	( )	( )
	( )	( )	( ) James S. Coleman	( )	( )	( )	( )	( )	( )	( )
	( )	( )	( ) Robert B. Harwood	( )	( )	( )	( )	( )	( )	( )
	( )	( )	( ) James N. Bloodworth	( )	( )	( )	( )	( )	( )	( )
	( )	( )	( ) Eugene (Bull) Connor	( )	( ) Fred R. Jones	( )	( ) John Henry Davis	( )	( )	( )
	( ) Ben F. Ray	( )	( ) Earl Morgan	( ) Mrs. Phoebe Cary Shoemaker	( ) M. J. Lyons, Jr.	( )	( ) E. D. Bouler	( )	( )	( )
	( ) Charles A. Bentley, Jr.	( ) Aaron C. Edwards	( ) Mabel S. Amos	( ) Mrs. J. E. Dillard	( ) James C. Van Antwerp, Jr.	( )	( ) William McKinley Branch	( )	( )	( )
	( ) Lafayette Patterson	( )	( ) MacDonald Gallion	( ) Mrs. Bertha Wallis Lee	( ) Paul Lowery	( )	( ) Mrs. Virginia Durr	( )	( )	( )
	( ) Ray D. McCord	( ) Ronald L. Pankey	( ) Mrs. Armistead Selden	( ) Mrs. Daisy Williams	( ) William H. Graham	( )	( ) R. E. Cardray	( )	( )	( )
	( ) Dot Little	( )	( ) Mrs. Jim Allen	( ) D. N. Stephenson	( ) Hult Sullivan	( )	( ) J. H. Davis	( )	( )	( )
	( ) Coleman A. Leller, Jr.	( ) Bernice H. Morrison	( ) Richard (Dick) Beard	( ) Jerome B. Couch	( ) Robert D. Wilkinson, Jr.	( )	( ) George DeBoer	( )	( )	( )
	( ) Isom Clemon	( )	( ) Frank Mizell	( ) Ogburn A. Gardner	( ) Lee Clyde Traylor	( )	( ) Jack Drake	( )	( )	( )
	( ) James McArthur Reed	( )	( ) Albert Brewer	( ) Mrs. Lois Goodwin	( ) J. Smith Lanier, II	( )	( ) Billy Joe Robinson	( )	( )	( )
	( ) J. E. Brantley	( ) Steve E. Nation	( ) Mrs. Agnes Baggett	( ) Fred M. Burns	( ) Robert H. Maxwell	( )	( ) Robert Schwenn	( )	( )	( )
	( ) Joe L. Reed	( )	( ) Ernest Stone	( ) Mrs. Beulah K. Gray	( ) George Howard Young	( )	( ) James Williams	( )	( )	( )
8th	( )	( )	( ) Walter Flowers	( )	( ) Frank W. Donaldson	( ) W. C. (Chad) Gibbs	( ) William McKinley Branch	( ) Richard Eugene Delaney	( ) Mike Simpson	( )
No. 1	( )	( )	( ) G. D. Seale	( )	( )	( )	( )	( )	( )	( )
No. 3	( )	( )	( ) J. E. Henderson	( )	( )	( )	( )	( )	( )	( )
No. 5	( )	( )	( ) Homer E. Carpenter	( )	( )	( )	( )	( )	( )	( )
No. 6	( )	( )	( ) W. Herman Drummond	( )	( )	( )	( )	( )	( )	( )
	( )	( )	( ) Hugh Gould	( )	( )	( )	( )	( )	( )	( )
	( )	( )	( ) Richard Owens	( )	( )	( )	( )	( )	( )	( )
	( )	( )	( ) M. A. (Aduston) Cook	( )	( )	( )	( )	( )	( )	( )

Official Absentee Ballot, General Election, November 5, 1968

GREENE COUNTY

Names Of Offices To Be Voted For	ALABAMA INDEPENDENT DEMOCRATIC PARTY	AMERICAN INDEPENDENT PARTY OF ALABAMA	DEMOCRATIC PARTY	PROHIBITION PARTY	REPUBLICAN PARTY	THE ALABAMA CONSERVATIVE PARTY	THE NATIONAL DEMOCRATIC PARTY OF ALABAMA	INDEPENDENT
For United States Senator—Vote for One	( )	( )	( ) Jim Allen	( )	( ) Perry O. Hooper	( )	( ) Robert P. Schwenn	( )
For Associate Justice Supreme Court, Place No. 1—Vote for One	( )	( )	( ) James B. Coleman	( )	( )	( )	( )	( )
For Associate Justice Supreme Court, Place No. 6—Vote for One	( )	( )	( ) Robert B. Harwood	( )	( )	( )	( )	( )
For Associate Justice Supreme Court—Unexpired Term—Vote for One	( )	( )	( ) James N. Bloodworth	( )	( )	( )	( )	( )
For President Public Service Commission—Vote for One	( )	( )	( ) Eugene (Bull) Connor	( )	( ) Fred R. Jones	( )	( ) John Henry Davis	( )
For Presidential Elector, Place No. 1—Vote for One	( ) Ben F. Ray	( )	( ) Earl Morgan	( ) Mrs. Phoebe Cary Shoemaker	( ) M. J. Lyons, Jr.	( )	( ) E. D. Boulet	( )
For Presidential Elector, Place No. 2—Vote for One	( ) Charles A. Bentley, Jr.	( ) Aaron C. Edwards	( ) Mabel S. Amos	( ) Mrs. J. K. Dillard	( ) James C. Van Antwerp, Jr.	( )	( ) William McKinley Branch	( )
For Presidential Elector, Place No. 3—Vote for One	( ) Lafayette Patterson	( )	( ) MacDonald Gallion	( ) Mrs. Bertha Wallis Lee	( ) Paul Lowery	( )	( ) Mrs. Virginia Durr	( )
For Presidential Elector, Place No. 4—Vote for One	( ) Ray D. McCord	( ) Ronald L. Pinkley	( ) Mrs. Armistead Selden	( ) Mrs. Daisy Williams	( ) William H. Graham	( )	( ) R. E. Cordray	( )
For Presidential Elector, Place No. 5—Vote for One	( ) Dot Little	( )	( ) Mrs. Jim Allen	( ) D. N. Stephenson	( ) Hull Sullivan	( )	( ) J. H. Davis	( )
For Presidential Elector, Place No. 6—Vote for One	( ) Coleman A. Lollar, Jr.	( ) Bernice H. Morrison	( ) Richard (Dick) Beard	( ) Jerome B. Couch	( ) Robert D. Wilkinson, Jr.	( )	( ) George DeBoer	( )
For Presidential Elector, Place No. 7—Vote for One	( ) Isom Clemon	( )	( ) Frank Misell	( ) Ogburn A. Gardner	( ) Lee Clyde Traylor	( )	( ) Jack Drake	( )
For Presidential Elector, Place No. 8—Vote for One	( ) James MacArthur Reed	( )	( ) Albert Brewer	( ) Mrs. Lois Goodwin	( ) J. Smith Lanier, II	( )	( ) Billy Joe Robinson	( )
For Presidential Elector, Place No. 9—Vote for One	( ) J. E. Brantley	( ) Steve E. Nation	( ) Mrs. Agnes Baggett	( ) Fred M. Burns	( ) Robert H. Maxwell	( )	( ) Robert Schwenn	( )
For Presidential Elector, Place No. 10—Vote for One	( ) Joe L. Reed	( )	( ) Ernest Stone	( ) Mrs. Beulah K. Gray	( ) George Howard Young	( )	( ) James Williams	( )
For Representative in Congress from 6th Congressional District—Vote for One	( )	( )	( ) Walter Flowers	( )	( ) Frank W. Donaldson	( ) W. C. (Chad) Gibbs	( ) William McKinley Branch	( ) Richard Eugene Delaney
For County Commissioner, District No. 1—Vote for One	( )	( )	( ) G. D. Seale	( )	( )	( )	( ) Vassie Knott	( )
For County Commissioner, District No. 2—Vote for One	( )	( )	( ) J. E. Henderson	( )	( )	( )	( ) Harry C. Means	( )
For County Commissioner, District No. 3—Vote for One	( )	( )	( ) Homer E. Carpenter	( )	( )	( )	( ) Levi Morrow, Sr.	( )
For County Commissioner, District No. 4—Vote for One	( )	( )	( ) W. Herman Drummond	( )	( )	( )	( ) Frenchie Burton	( )
For Greene County Board of Education, Place No. 1—Vote for One	( )	( )	( ) Hugh Gould	( )	( )	( )	( ) Robert Hines	( )
For Greene County Board of Education, Place No. 5—Vote for One	( )	( )	( ) Richard Owens	( )	( )	( )	( ) J. A. Posey, Sr.	( )
For Tax Assessor—Vote for One	( )	( )	( ) M. A. (Aduston) Cook	( )	( )	( )	( )	( )
For Justice of the Peace, Precinct No. 1—Vote for One	( )	( )	( ) James E. Tuck	( )	( )	( )	( )	( )

AFFIDAVIT FOR ABSENTEE VOTER

STATE OF ALABAMA
GREENE COUNTY

Before me, the undersigned authority, personally appeared _____ who is (made) known to me and who, being first duly sworn, deposes and says: I am a bona fide and qualified elector of Precinct _____ and Box No. _____ in Greene County, State of Alabama. I have not voted in the election to be held on November 5, 1968, and I am entitled to vote therein. My regular business or occupation requires my absence from the county of my residence, and I will be absent from the county on the day of the election, or my regular business or occupation has so required me during the period of time required by law for me to vote in person at the polling place in my precinct.

_____
(Signature of Voter)

Sworn to and subscribed before me this _____ day of _____, 1968.

_____
(Official Capacity)

FOR ABSENT VOTER WHO IS THE WIFE OF A MEMBER OF THE ARMED FORCES

I hereby certify that the person whose signature appears above is the wife of a member of the Armed Forces and is residing with such member of the Armed Forces.

_____
Commanding Officer or Authority in Charge of the Husband of Above Named Person

FOR ABSENT VOTER WHO IS A VETERAN CONFINED TO A HOSPITAL OPERATED BY THE VETERANS' ADMINISTRATION

I hereby certify that the person whose signature appears above is confined to a hospital operated by the Veterans' Administration.

_____
Official Capacity

FOR PHYSICALLY INCAPACITATED PERSONS TO VOTE ABSENTEE BALLOT

Before me the undersigned authority, personally appeared _____ who is (made known) known to me and who, being first duly sworn, deposes and says: I am a bona fide resident and qualified elector of Beat or Precinct No. _____ and Box No. _____ in Greene County, State of Alabama and have not voted in the election to be held on the 5th day of November, 1968, and

(Signature of Voter)

I hereby certify that the person whose signature appears above is physically incapacitated and unable to go to the polling place in his precinct to vote.

_____
(Official Capacity)

FOR ELECTOR ATTENDING UNIVERSITY OR SPOUSE OF SUCH ELECTOR

I am a bona fide resident and qualified elector of Precinct No. _____ and Box No. _____ in Greene County, State of Alabama. I will be absent from the county of my residence on account of my attendance at college and I am the spouse of such elector at which I am duly enrolled outside the county.

(Signature of Voter)

I hereby certify that the person whose signature appears above is the spouse of a student attending college.

_____
(Official Capacity)

Official Absentee Ballot, General Election, November 5, 1968

Of To For	ALABAMA INDEPENDENT DEMOCRATIC PARTY	AMERICAN INDEPENDENT PARTY OF ALABAMA	DEMOCRATIC PARTY	PROHIBITION PARTY	REPUBLICAN PARTY	THE ALABAMA CONSTITUTIONAL PARTY	THE NATIONAL DEMOCRATIC PARTY OF ALABAMA	INDEPENDENT	INDEPENDENT	FOR WRITE-IN
—Vote for One	( )	( )	( ) Jim Allen	( )	( ) Perry O. Hooper	( )	( ) Robert P. Schwenn	( )	( )	( )
	( )	( )	( ) James B. Coleman	( )	( )	( )	( )	( )	( )	( )
	( )	( )	( ) Robert B. Norwood	( )	( )	( )	( )	( )	( )	( )
	( )	( )	( ) James M. Bloodworth	( )	( )	( )	( )	( )	( )	( )
	( )	( )	( ) Eugene (Bull) Connor	( )	( ) Fred R. Jones	( )	( ) John Henry Davis	( )	( )	( )
No. 1—	( ) Ben F. Bay	( )	( ) Earl Morgan	( ) Mrs. Phoebe Cary Shoemaker	( ) M. J. Lyle, Jr.	( )	( ) E. D. Bouier	( )	( )	( )
No. 2—	( ) Charles A. Bentley, Jr.	( ) Aaron C. Edwards	( ) Mabel B. Amos	( ) Mrs. J. E. Dillard	( ) James C. Van Antwerp, Jr.	( )	( ) William McKinley Branch	( )	( )	( )
No. 3—	( ) Lafayette Patterson	( )	( ) MacDonald Gallion	( ) Mrs. Bertha Wallis Lee	( ) Paul Lowery	( )	( ) Mrs. Virginia Durr	( )	( )	( )
No. 4—	( ) Ray D. McCord	( ) Millard L. Pusley	( ) Mrs. Armistead Selden	( ) Mrs. Daisy Williams	( ) William H. Graham	( )	( ) R. E. Cordray	( )	( )	( )
No. 5—	( ) Dot Little	( )	( ) Mrs. Jim Allen	( ) D. N. Stephenson	( ) Hull Sullivan	( )	( ) J. H. Davis	( )	( )	( )
No. 6—	( ) Coleman A. Lollar, Jr.	( ) Royston H. Harrison	( ) Richard (Dick) Beard	( ) Jerome B. Couch	( ) Robert D. Wilkinson, Jr.	( )	( ) George DeLoor	( )	( )	( )
No. 7—	( ) Isom Clausen	( )	( ) Frank Minoli	( ) Ogburn A. Gardner	( ) Lee Clyde Traylor	( )	( ) Jack Drake	( )	( )	( )
No. 8—	( ) James McArthur Reed	( )	( ) Albert Brewer	( ) Mrs. Lois Goodwin	( ) J. Smith Lanier, II	( )	( ) Billy Joe Robinson	( )	( )	( )
No. 9—	( ) J. E. Brantley	( ) Steve E. Nation	( ) Mrs. Agnes Baggett	( ) Fred M. Burns	( ) Robert H. Maxwell	( )	( ) Robert Schwenn	( )	( )	( )
No. 10—	( ) Joe L. Reed	( )	( ) Ernest Stone	( ) Mrs. Beulah K. Gray	( ) George Howard Young	( )	( ) James Williams	( )	( )	( )
from 9th Cir. Ct.	( )	( )	( ) Walter Flowers	( )	( ) Frank W. Donaldson	( ) W. C. (Chad) Gibbs	( ) William McKinley Branch	( ) Richard Eugene Delaney	( ) Mike Simpson	( )
No. 1—	( )	( )	( ) G. D. Seale	( )	( )	( )	( ) Vassie Knott	( )	( )	( )
No. 2—	( )	( )	( ) J. E. Henderson	( )	( )	( )	( ) Harry C. Means	( )	( )	( )
No. 3—	( )	( )	( ) Homer E. Carpenter	( )	( )	( )	( ) Levi Morrow, Sr.	( )	( )	( )
No. 4—	( )	( )	( ) W. Hermon Drummond	( )	( )	( )	( ) Frenchie Burton	( )	( )	( )
of Education,	( )	( )	( ) Hugh Gould	( )	( )	( )	( ) Robert Hines	( )	( )	( )
of Education,	( )	( )	( ) Richard Owens	( )	( )	( )	( ) J. A. Posey, Sr.	( )	( )	( )
One	( )	( )	( ) M. A. (Adduston) Cook	( )	( )	( )	( )	( )	( )	( )
Precinct No. 1—	( )	( )	( ) James E. Tuck	( )	( )	( )	( )	( )	( )	( )

AFFIDAVIT FOR ABSENTEE VOTER

STATE OF ALABAMA
GREENE COUNTY

Before me, the undersigned authority, personally appeared _____ who is (made) known to me and who, being first duly sworn, deposes and says: I am a bona fide resident and qualified elector of Beat or Precinct No. _____ and Box No. _____ in Greene County, State of Alabama. I have not voted in the election to be held on November 5, 1968, and I am entitled to vote therein. My inability to appear personally before the election there the county of my residence, and I will be absent from the county on the day of the said election because of my employment or business as _____

FOR ABSENT VOTER WHO IS THE WIFE OF A MEMBER OF THE ARMED FORCES

I hereby certify that the person whose signature appears above is the wife of a member of the Armed Forces and is residing with such member of the Armed Forces.

_____
Commanding Officer or Authorized Officer in Charge of the Husband of Above Named Person

FOR ABSENT VOTER WHO IS A VETERAN CONFINED TO A HOSPITAL OPERATED BY THE VETERANS' ADMINISTRATION

FOR PHYSICALLY INCAPACITATED PERSONS TO VOTE ABSENTEE BALLOT

Before me, the undersigned authority, personally appeared _____ who is (made known) to me and who, being first duly sworn, deposes and says: I am a bona fide resident and qualified elector of Beat or Precinct No. _____ and Box No. _____ in Greene County, State of Alabama and have not voted in the election to be held on the 5th day of November, 1968, and

FOR ELECTOR ATTENDING UNIVERSITY OR COLLEGE OR SPOUSE OF SUCH ELECTOR

I am a bona fide resident and qualified elector of Beat or Precinct No. _____ and Box No. _____ in Greene County, State of Alabama. I will be absent from the county of my residence because of my attendance at a university or college and I am the spouse actually residing with such elector at which I am duly enrolled outside the county on the day of election.

_____
(Signature of Voter)

I hereby certify that the person whose signature appears above is duly enrolled at the university or college

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 647

SALLIE M. HADNOTT; REVEREND WILLIAM McKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR.; and THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, a corporation, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

MABEL S. AMOS, as Secretary of the State of Alabama; EDWARD A. GROUBY, as Judge of Probate for Autauga County, Alabama; and all other Judges of Probate of the State of Alabama, jointly and severally, who are similarly situated; ALBERT P. BREWER, as Governor of the State of Alabama; MacDONALD GALLION, as Attorney General of the State of Alabama, and their successors in each office,

Appellees,

EDWARD F. MAULDIN, as Chairman of Alabama Citizens for Humphrey-Muskie, for himself and all other persons similarly situated,

Appellee-Intervenor,

and,

JAMES DENNIS HERNDON, Judge of Probate of Greene County, Alabama,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OR ALABAMA AND IN THE MATTER OF CONTEMPT OF COURT BY JAMES DENNIS HERNDON.

APPELLEES' BRIEF AND APPENDIX

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SALLIE M. HADNOTT; REVEREND WILLIAM McKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR.; and THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, a corporation, for themselves jointly and severally, and for all others similarly situated,

Appellants,

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Appellees,

EDWARD F. MAULDIN, as Chairman of Alabama Citizens for Humphrey-Muskie, for himself and all other persons similarly situated,

Appellee-Intervenor,

and,

JAMES DENNIS HERNDON, Judge of Probate of Greene County, Alabama,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA AND IN THE MATTER OF CONTEMPT OF COURT BY JAMES DENNIS HERNDON.

APPELLEES' BRIEF AND APPENDIX

OPINION BELOW

The opinion of the United States District Court for the Middle District of Alabama has not yet been reported, but a copy thereof is set forth in the Appendix hereto at Page ~~1~~ 37 et seq.

JURISDICTION

Appellants' brief sets forth the grounds on which they seek to invoke the jurisdiction of this Court. Appellees merely point to the statement in the opinion below that the three-judge court, exercising its discretion, decided only the substantial issues concerning the Constitution of the United States. No position is taken herein concerning the matter of James Dennis Herndon, who is separately represented in the contempt proceeding.

QUESTIONS PRESENTED

Appellees take the position that the statement in Appellants' brief of the questions presented for review contains unnecessary detail. Portions thereof, particularly under Questions 3 and 4, are confusing. Further, Questions 3 and 4 appear to assume an unequal application of the statutes involved adverse to Appellants. Where the question of equality of application arises in this case, it is a question of fact. To the extent that such question was resolved by the Court below, it was resolved contrary to the contention or assumption of Appellants expressed in this section.

Appellees are defending on the merits solely, and will not respond to Question No. 7, involving only the contempt proceedings against James Dennis Herndon.

STATEMENT OF THE CASE

Counsel for Appellees have not had a complete copy of the record in this case available in the preparation of their brief. References to various of the depositions which were admitted into evidence will be made by citation of the surname of the deponent and the page of the deposition. Appellants will not undertake a complete statement of the case,

but will only call to the attention of the Court such matters as they deem necessary in correcting inaccuracies or omissions in the statements submitted by Appellants.

Dr. John Cashin, Jr., and others, began to discuss the possibility of their political party in Alabama during the 1964 Democratic Convention, deciding that they would work toward the end that in 1968 they would have candidates on the ballot (Cashin 209). They continued working through 1965 and 1966, but "really started picking up steam in 1967" (Cashin 210-212, 247). Dr. Cashin, now Chairman of the party, was Vice Chairman from the inception. Alvis Howard was the original Chairman. Cashin, Howard, and others, "made attempts" to charter the party "as far back as September of 1967," but actually incorporated it on January 12, 1968 (Cashin 8). Dr. Cashin's activity in the party was statewide. He was aware of the requirements of the Garrett Act with reference to the filing of Declarations of Intent to become a candidate for office, where the individual was running under the auspices of a political party not holding a primary election, and knew that the law required the filing of such Declaration of Intent by March 1, 1968 (Cashin 16). He caused party members to be advised of this fact, sending a communication out from the state office to all county chairmen. There also was information given concerning this fact at the January 27 meeting (Cashin 17). Dr. Cashin also was aware of the requirements of the Corrupt Practices Act of the State of Alabama, and the party had forms printed entitled at the top "Declaration of Intention, Act 243—National Democratic Party of Alabama" (Cashin 18). This form also contained a section whereby the candidate could designate himself or others as his committee to receive campaign contributions under the Corrupt Practices Act, and the entire form was printed some time in January

1968 (Cashin 19). Dr. Cashin has a personal awareness that a great many of the candidates who were named in the Certificates of Nomination filed on behalf of the National Democratic Party of Alabama (hereinafter sometimes referred to as N.D.P.A.) did not file these documents (Cashin 21). For example, although the verified complaint originally filed in this action alleges that the ten candidates of the N.D.P.A. for the position of presidential elector had filed a compliance with the Garrett Act (on the form containing the Corrupt Practices Act statement), it appears that only four of the persons actually nominated by the party for this position filed such documents, and each of these four filed his declaration for a different numbered position than that in which the Certificates of Nomination filed with the Secretary of State ultimately showed him to have been nominated (Cashin 105-110).

Although local and district candidates of the N.D.P.A. purportedly were nominated at mass meetings held at various locations on May 7, 1968, the primary election day, and statewide candidates were nominated at a convention on July 20, 1968, many of the persons whose names were submitted as nominees actually did not know of their nomination until long thereafter (Cashin 238-239). Further, it appears that no Certificate of Nominations of local or district candidates were filed with the Probate Judge of any county or with the Secretary of State at any time between May 7, 1968, and the July 20 convention (Cashin 251). It likewise appears to be the case that all certificates that were filed with the various Judges of Probate and with the Secretary of State were filed about September 4 or September 5, 1968, a bare sixty days before the general election (Cashin 251-253, 170-172; Meeks 8-15).

The Probate Judge of Jefferson County, Alabama, re-

ceived in his office alone approximately 2000 Declarations of Intention and Designation of Finance Chairman under the Corrupt Practices Act in connection with the 1968 election (Meeks 22).

There is no testimony in the record of noncompliance with the Garrett Act and the Corrupt Practices Act by other parties, or any testimony to the effect that these acts are not observed by those charged with the enforcement or execution of the election laws. While Dr. Cashin did testify that he had been told that the Corrupt Practices Act was treated casually, he also reiterated his awareness of its requirements and testified that he would suppose "that everyone obeyed the law." (Cashin 250).

Mr. Robert Schwenn, the N.D.P.A. candidate for presidential elector and for the United States Senate, is presented by Appellants as proof of their contention that Code of Alabama, Title 17, Section 148, is not observed in its requirement that the name of each candidate shall appear but one time on the ballot, and under only one emblem. It appears very clearly from his testimony, however, that Mr. Schwenn's double appearance was on the ballot during a Democratic Primary, which uses this vehicle to elect its party officers and to nominate its candidates for public office. He was a candidate in the Democratic Primary for County Judge, and he was a candidate for member of the Madison County Democratic Executive Committee in 1966. He was, by the way, elected to the County Democratic Executive Committee, a position which he still holds, in spite of his nomination for two posts by the N.D.P.A. (Schwenn 48-49). He also is Chairman of the Madison County Executive Committee of the N.D.P.A., and a member of its State Executive Committee (Schwenn 6). He participated in the regular Democratic

Primary on May 7, 1968, when that party nominated its candidate for the United States Senate (Schwenn 7).

Dr. Cashin estimates that the membership of his party throughout the State of Alabama "is in the neighborhood of 2,000 people or better, 2,000 or 3,000." This estimate is based on the fact that they had 5,000 membership cards printed, and they have fewer than 1,000 left. He assumes that they weren't just thrown away (Cashin 243). The N.D.P.A. list of candidates submitted by its counsel to the court below reflects that it claims no candidates for local office in 50 of Alabama's 67 counties. It presents only one local candidate in each of four counties and only two in four others (Letter September 18, 1968, to Court from counsel for Plaintiffs). About September 20, 1968, counsel for Appellants undertook to file a statement with the Judges of Probate of the various counties and with the Secretary of State declaring the candidate himself the person to receive campaign contributions pursuant to Code of Alabama, Title 17, Section 274. None of these designations were signed by the candidate involved, and would have been received in the various locations no earlier than September 20, 1968 (R. 246). Exhibits A through S to Appellees' answer were separately offered below (R. 291-397); and they, along with Defendants' Exhibit 2 below (R. 278), reflect the failure of Appellants' candidates to comply with the requirements of law in their filing with the various Judges of Probate, while the various exhibits to the deposition of Mrs. Mabel Amos, Secretary of State, reflects the same deficiencies with reference to candidates for State offices, including presidential elector (Amos).

SUMMARY OF ARGUMENT

Appellees note that Appellants' brief and argument bear a marked resemblence to the brief submitted on their behalf

when this case was argued before this Court in October, 1968. Appellees' brief, likewise, will have the same degree of identity with their former brief. It is to be recalled that a motion was made for the advancement of consideration of this matter on the merits upon original submission. This motion was not resisted by Appellees, and all parties proceeded to the October hearing directing their attention toward the merits of this matter. The true merits have not changed.

Appellees' brief will not attempt to reply to those arguments of Appellants directed to the matter of the contempt proceeding against James Dennis Herndon. This is not a matter within the merits of this cause as originally constituted, and it presents an issue in which Herndon is separately represented.

The Alabama Corrupt Practices Act, Code of Alabama, Title 17, Sections 268-286, requires candidates for public office to file with designated officials, within five days after the announcement of their candidacy, a designation of a committee to receive and disburse all monies raised in the campaign. The statutory penalty for a failure of compliance is a prohibition against the name of the defaulting candidate being placed upon the ballot. This requirement is mandatory where the issue is raised before the election in Alabama. Appellants failed to comply with this Act, and are disqualified as candidates. This legislation is not subject to the Voting Rights Act of 1965, 42 U. S. C., Sections 1971-73p. It is not unconstitutional on its face, and is not shown to have been unequally applied to Appellants.

The Garrett Act, Code of Alabama, Title 17, Section 145(3), merely has the effect of requiring independent candidates for public office, or party candidates whose parties

do not conduct primary elections to file their declaration of intent to become candidates by the same date required of candidates who are members of parties conducting political party primaries, i.e., March 1, immediately preceding the primary election. Most of the statutes relating to primary elections and other nomination procedures have existed in Alabama since the early or mid-1930s. The Garrett Act imposes no new qualifications, but it systematizes the existing law by requiring all individuals who seek to become candidates for public office to manifest their intention to do so by the same deadline date. This Act is equally applied to all candidates, whether they are independents or political party candidates. It is not shown to have been unequally applied to the Appellants. The law is not unconstitutional on its face. The finding of the court below was to the effect that it is not facially unconstitutional, and that there was no showing that it had been applied discriminatorily as to these Appellants. Likewise, the three-judge court held that the provisions of the Garrett act are not subject to the Voting Rights Act of 1965.

Code of Alabama, Title 17, Section 125, provides that the appointment of polling place officials shall be made from the list presented by the two political parties having received the highest number of votes in the State in the next preceding regular election, if each of said parties presents a list. When its validity is separately considered, it is apparent that the section is constitutional. Other provisions of Alabama law give ample protection to independent candidates and smaller political parties in their desire to secure a fair and free election. Polling place officials are necessarily limited in number, but other provisions authorize watchers and representatives of candidates and parties adequate to assure that their interests are protected.

Appellants attack Code of Alabama, Title 17, Section 148, which requires that the name of each candidate shall appear but one time on the ballot and under only one emblem. The weight of judicial authority in this country is to the effect that such restrictions in State law are valid. It is apparent in the record in this case that there was no inequality in the application of this law to Appellants. The fact that they were unable to reach an accord with the Alabama Independent Democratic Party in determining upon one slate of candidates for Presidential Elector for both parties does not render the statute invalid.

Appellants' argument that rights guaranteed to them by the Constitution have been violated by their inability to vote an effective straight ticket as "guaranteed" by the provisions of Code of Alabama, Title 17, Sections 97, 157, is without merit. It would have been impossible for adherents of the NDPA to have participated fully in the election by voting only for candidates of that party. In most counties they had no local candidates, and in others, only a few. In fact, straight ticket voting is only one option given to the voter in Alabama. The applicable statutes allow every combination of voting possible on any ballot. In fact, Code of Alabama, Title 17, Section 161, authorizes any voter to vote a straight ticket for the candidates of one party, and to vote for other candidates anywhere on the ballot for positions in which his straight ticket contains no nominees. N.D.P.A. members had the right to vote a straight ticket for any candidates of that party whose names were properly placed on the ballot. The right of the voter to mark his ballot in a particular fashion, however, cannot entitle him to demand that candidates who fail to qualify shall have their names placed on the ballot in order to accommodate his desires.

ARGUMENT

The Corrupt Practices Act

Appellants complain of the intricate format of the Alabama ballot, which we shall touch upon later, and yet assert that the Alabama law imposes almost insurmountable barriers to securing position on that ballot. It must appear that, if the ballot presents any difficulty to the voter, it is because of the proliferation of parties and candidates thereon. [There were, in fact, seven political parties, plus independent candidates, on the 1968 ballot]. This alone seems to testify to some degree that satisfaction of the Alabama law by prospective candidates and their parties is not the most difficult task.

The Alabama Corrupt Practices Act, Code of Alabama, Title 17, Sections 268-286, is a venerable piece of legislation which has existed in substantially its present form since 1915. Appellants train their guns on Sections 274 and 275. The first of these requires candidates, within five days after the announcement of candidacy for any office, to file with the Secretary of State or the Probate Judge, as appropriate, a designation of committee to receive and disburse all monies raised in the campaign. Various requirements are imposed on the person or persons, including the candidate, acting as such committee. The latter section expressly provides that the failure to make such designation is a corrupt practice within the meaning of that Act, and the name of the candidate failing to make the declaration shall not be allowed to go upon the ballot.

It is apparent that Appellants' candidates, state and local, failed to satisfy the requirements of the Corrupt Practices Act. A mere handful of such designations was received.

It is now complained that Appellees have lost the right to defend this action by asserting the disqualification of any of these candidates, on the ground that its use as a disqualifying factor by Mrs. Mabel Amos, the Secretary of State, was "an afterthought." If this argument could be valid in any case, its complete lack of merit here is demonstrated by a reading of Section 274. It is only the candidates for State office who are required to file the designation of committee with the Secretary of State. This would include the candidates for presidential elector, United States Senate, and Alabama Public Service Commission. Candidates for County office file with the Judge of Probate of the county involved, while candidates for district or circuit office file with the Judges of Probate of each county embraced in the district or circuit. The 67 Probate Judges of the State of Alabama were defendants in this action. Appellants attribute to them no action which would estop them to assert the provisions of this section to disqualify candidates failing to comply. Indeed, when it is remembered that no certifications of candidacy were given to the Secretary of State or the Probate Judges until the last possible moment, Appellants acted at their peril that they might not have complied with all the mandatory provisions of the law. The disqualification is not an act of discretion on the part of the Probate Judge or the Secretary of State. If a candidate fails to satisfy the requirements of the Act, his name "shall not be allowed to go upon the ballot at such election." It appears that almost all of Appellants' certifications were filed simultaneously in the various offices, on September 5, 1968. It is odd that a party whose leadership disseminated to its members its knowledge of the requirements of the Garrett Act and the Corrupt Practices law and which claims to have nominated its local candidates on May 7, 1968, and its state candidates on July 20, 1968, withheld filing its certifications of nomination until

September 5, 1968, when almost all of them were mailed from Huntsville, Alabama. If it be maintained that they had a right to do this, it at least must be acknowledged that state and local officials charged with the execution of the law are given a reasonable time to do their duty. Mrs. Amos' notification of disqualification of the state candidates was given without delay. Her failure to list every reason why particular candidates might not be qualified cannot create in Appellants a constitutional right to assert that the same law which applies to all other candidates does not apply equally to them. In the brief for the United States as *amicus curiae*, reference is made to the "deceptive silence by officials" in connection with the failure of Appellants to satisfy the requirements of the Corrupt Practices Act. This overlooks rather completely a pertinent fact revealed by the record. It is clear, as pointed out in our Statement of the Case, that the various certifications of nomination filed with the Secretary of State and the Probate Judges throughout the State by the N.D.P.A. were filed almost simultaneously, with most of them being mailed from Huntsville, Alabama, and being received in the respective offices concerned about September 5. This was approximately 60 days before the general election, and was at the very last minute allowed by Alabama law for the ultimate certification. This political party claims to have nominated these same people for local positions on May 7, and for statewide positions in a convention on July 20, 1968. There was a silence here which perhaps the party had a right, for its own purposes, to maintain until approximately September 5. Appellees do not necessarily call it "deceptive." It is, however, rather amazing that the argument is now presented that the State and local officials involved, apparently maliciously, refrained from contacting the persons who mailed the respective certifications, or the persons named therein, and advising them that they must hurry and file a compliance with the

Corrupt Practices Act. Remember, that the record demonstrates that the N.D.P.A. leadership was aware of the requirements of the Act and had circulated the form to its members. Further, the record amply demonstrates the adequate legal advice available to the members of this party regarding the requirements of qualifying as a candidate. Appellants attempt to rely upon the fact that there are only three attorneys in Greene County, Alabama, in the Herndon matter, carrying their argument over into the argument on the merits of this case, in an effort to demonstrate that appellants were, somehow, discriminated against. It appears, as previously stated, that rather eminent Counsel were involved with the leadership of this party, and that they also were involved in giving to the leadership the advice necessary to appropriate qualification. The fact that this was not accomplished by any substantial number of the purported candidates cannot be laid at the doorstep of the Secretary of State or of the Probate Judges. The doctrine of estoppel simply does not fit here.

The three-judge court below was unanimous in its finding that the Corrupt Practices Act is not unconstitutional on its face. The majority held that it is not demonstrated to have been unequally applied. In fact, the only direct testimony in the case concerning the application of the law in this election is found in the testimony of Mrs. Amos and of Probate Judge Meeks, who stated that approximately 2,000 such declarations were filed in Jefferson County, Alabama, alone. There is no question but that these sections are mandatory before elections in Alabama. *Vickery v. King*, 202 So. 2d 148 (1967), 210 So. 2d 415 (1968); *Jones v. Phillips*, 279 Ala. 354, 185 So. 2d 378 (1966); *Owens v. Heartsill*, 279 Ala. 359, 185 So. 2d 382 (1966).

The fact that some candidates for the United States

House of Representatives were involved does not impair the efficacy of the Alabama statutes. The Federal Corrupt Practices Act is explicit in this regard. 2 U.S.C.A. §254 reads as follows:

> "This chapter and Section 208 of Title 18 shall not be construed to annul the laws of any State relating to the nomination or election of candidates, unless directly inconsistent with the provisions of this chapter and Section 208 of Title 18, or to exempt any candidate from complying with such State laws."

It is obvious that the aim of the Corrupt Practices Act is to impose certain limitations on campaign expenditures and to prohibit certain practices which are therein declared to be corrupt. Individual candidates and their supporters are the subjects of this legislation. It does not tend to promote one political party or group at the expense of another, and it clearly has no racial connotations. The statute is explicit, as are the decisions of the highest court of the State of Alabama, construing it. These decisions are binding in the absence of a Federal constitutional question, *Gilmore v. Greene County Democratic Executive Committee*, 370 F. 2d 919 (5th Cir. 1966), and this case presents no constitutional ground for declaring the statute or its application to the candidates of N.D.P.A. to be invalid. What they actually seek is a declaration by this Court that this law does not apply to them.

As an "afterthought," Appellants, in their second amendment to the complaint, undertook to maintain that the Corrupt Practices Act violates the Voting Rights Act of 1965, 42 U.S.C.A., §1973. The mere reading of §1973(b) makes it apparent that the requirement that the candidate designate

a finance committee is not a "test or device" prerequisite for voting or registration thereunder. Since the law was in effect for almost 50 years before November 1, 1964, it is not subjected to the test of §1973(c), although it would surely pass that test.

Finally, Appellants argue that, assuming the State's legitimate interests in prohibiting transactions of the type envisaged by the Corrupt Practices Act, it still must take the "least drastic alternative" to achieve its lawful end. This Court is asked to equate decisions like *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951) and *King v. Smith,* 392 U.S. 309 (1968) with the facts of the instant case and the statute under consideration. The analogy will not fit. This case deals with the events required by valid legislative enactments to occur within the restricted time frame of an election campaign period. It is common to election laws of the various states that certain acts are required of candidates. They must file qualifying papers of some type, they customarily must pay a fee in some amount, and they must comply with corrupt practices laws. Obviously there must be some limitation of time. Appellants complain that they cannot decide when the time began to run for them. The fact is that they can be given the benefit of any starting point, and they didn't comply with the statute. A few of them filed designations of committee with their declarations of intent shortly before March 1, 1968. No others of their group ever filed a compliance with the Act until the blanket attempt by counsel about September 20. They did not file within five days of their nominations on May 7 at the "mass" meetings; they did not file within five days of nomination at the July 20 convention; and they did not file within five days of the certifications of candidacy descending simultaneously on the Secretary of State and the various judges of probate. They simply

must contend that they were not required to file at all. They ask this Court to excuse them from a compliance required of all other candidates. Failing this, they ask the Court to select some other "alternative" as a penalty. As the opinion below points out, disqualification is a common feature of the Corrupt Practices Acts of the various states for such omission. To deprive the state of the power to keep from its ballot one who does not comply with the laws relating to his qualification to be placed thereon is to make a shambles of the law. If it is to be done with regard to this requirement, it could be done with regard to any. The argument of Appellants merely is that these candidates are the candidates for whom certain voters would have voted had they been on the ballot and that a rejection of them from the ballot is a deprivation of the right to vote, in spite of their non-compliance with the law. The fact is that no one could have prevented the candidates of the N.D.P.A. from complying with the Corrupt Practices Act, had they undertaken to do so. Their party printed forms for them and encouraged their use. The officials of the State of Alabama received all that were filed. It is not contended that there was any attempted compliance that was aborted by an evil hand. They simply failed to try to comply with a valid law, and that law prohibits their being placed on the ballot. The decisions cited herein reflect the uniform interpretation and enforcement of that Act given by the Alabama courts, and the decision below is due to be upheld.

The Garrett Act

Appellants attack the Garrett Act, Code of Alabama, Title 17, §145(3), as if it is a statute unrelated to other election laws, devised solely for the purpose of denying them ballot position. This is a misconception. Since 1931, Title 17,

§348, has required that any person desiring to submit his name as a candidate in a primary election shall, by March 1, file his declaration of candidacy with the appropriate official of the party conducting the primary. All parties conducting primary elections have, since 1931, been required to hold them on the first Tuesday in May of election years. Title 17, § 340. Political parties may nominate by "mass meetings, beat meetings, or other meetings," or by convention. Since 1947, all meetings of any type for the purpose of nominating party candidates, or for selecting delegates to conventions to nominate candidates, have been required by law to be held on the same day as the primary elections—the first Tuesday in May of the election year. Title 17, §§ 413-416. Alabama law also provides for the placing of names of independent candidates on the ballot, where such candidates for local office present a written petition signed by 25 qualified electors, and where candidates for State or Federal office present a petition signed by at least 300 qualified electors. These petitions must be presented to the appropriate official by the first Tuesday in May, and this has been the law since 1935. Title 17, §145. Political parties are required to hold primaries if they cast, in the last preceding election, at least twenty per cent of the vote in the state or county, unless such party files with the Secretary of State its election not to do so at least sixty days before the date of the primary. Title 17, §§ 336-337. This election, in effect, must be made by March 1.

Since the requirement of Title 17, § 348, long has been that one desiring to be a candidate in the primary must file his declaration of candidacy by March 1, the effect of the Garrett Act, Title 17, §145(3), merely is to place all other candidates on the same footing. It requires that candidates of parties not holding primaries and independent candidates

must file a declaration of intent by March 1 with the Judge of Probate or the Secretary of State, as appropriate. The same starting time applies, therefore, to all candidates, by whatever means they are nominated, and whatever party emblem or independent label they may bear. The public purpose served by this legislation is that aspirants for office are impelled in their decisions to become candidates by their desire to seek and serve in particular offices. No group or individual has the opportunity to defer his decision and later make a choice based upon the weakness of the opposition in a particular race. Appellants emphasize that the March 1 date is approximately eight months prior to the general election day. The point is that it is only sixty days prior to the first Tuesday in May. It is not contended by Appellants that May 7, for example, is too early a date to require a party to make the actual selection of its nominees, whether by mass meeting or primary, although the actual import of their argument seems to be that any requirement which prevents a noncomplying member from being on the ballot is too severe and discriminatory. At any rate, it cannot reasonably be maintained that it is necessarily arbitrary and invalid for the law of a state to require that those people who seek nominations on a particular date declare their intention approximately sixty days beforehand. The law doesn't require merely that some do it. All are required to do so. This is another statutory provision that was well known to the leadership of the N.D.P.A. They had their form printed to cover it. They encouraged compliance. They simply did not get candidates.

Appellees feel that the decision of this Court on October 7, 1968, in *Williams v. Rhodes*, 89 S. Ct. 5 (1968), tends to uphold the validity of the Garrett Act, and, in fact, tends to demonstrate rather forcibly the reasonable nature of the

entire Alabama statutory scheme with reference to the acquisition of ballot position. Justice Black emphasized for the majority that, in its view, the State of Ohio had "made it virtually impossible for a new political party, . . . to be placed on the State ballots. . . ." It appears that the statutes there under attack would impose tremendous difficulty on a new party, although it might be of tremendous size, and on old parties, if they happen to have a very small number of members. The new party was required to secure petitions signed by qualified electors totaling fifteen percent of the number of ballots cast in the last preceding gubernatorial election. These petitions were required to be filed by February 7, 1968. Following this, the law still required a primary election to be conducted by the new political party, and apparently the only voters qualified to participate in such a primary would be those who had never voted before. Appellees maintain that the early filing deadline for the petitions was merely one of a bundle of burdens that this Court found to be constitutionally obnoxious in the Ohio case. As it applied to the Ohio American Independent Party, the requirement was that it file more than 433,100 signatures on petitions by February 7, and that it subsequently conduct a primary election conforming to a detailed and rigorous standard.

As stated, the Garrett Act puts every candidate, whether independent, member of a party holding a primary, or member of a party nominating in some other fashion, on an equal basis. It appears that the Ohio statutes tended to perpetuate whatever party balances previously existed, and erected formidable barriers against the creation of new parties or the launching of independent candidacies. That law also apparently prevented the casting of write-in ballots, while Alabama law makes provision therefor. Title 17, §155. Neither the Garrett Act nor any other provision of Alabama law requires any earlier starting time for one group than another. It

does not compel a political party or an independent candidate to demonstrate inordinate strength or great likelihood of winning before a name may be placed upon a ballot. It requires no demonstration of support from county to county, throughout congressional districts or otherwise, as a condition precedent to ballot position. In short, the statutes demonstrate the ease with which political parties and independent candidates may be placed upon the Alabama ballot, and the Garrett Act creates no additional obstacle. Except for a handful of counties in which the Republican Party holds primary elections, the Democratic Party is the only party conducting primaries in the state. Its candidates declare their intent by March 1 to the appropriate party officers. The candidates of all other parties, and there were six others on the Alabama ballot, filed declarations of intent before March 1. The N.D.P.A. maintains that this rule should not apply to it.

Appellees perceive that there is a material difference in the issues raised in an attack on the Garrett Act and the issues raised in three cases submitted to this Court on October 15, 1968. *Fairley v. Patterson*, 282 F. Supp. 164 (S.D. Miss. 1967), involved a legislative change from district to at-large voting for certain county officers; *Bunton v. Patterson*, 281 F. Supp. 918 (S.D. Miss. 1967) involved a legislative enactment making certain offices appointive which formerly had been elective and *Whitley v. Williams*, No. 1174 (S.D. Miss. 1967), imposed several new requirements on independent candidates in general elections. Appellants maintain that *Sellers v. Trussell*, 253 F. Supp. 915 (M.D. Ala. 1965) is a comparable case. We find it very difficult to equate an act extending a term of office with one merely requiring every candidate for every office to declare his intention by a certain date. The decision below that the

Garrett Act is not a "voting qualification or prerequisite to voting" or a "standard, practice or procedure with respect to voting" within the meaning of the Voting Rights Act of 1965, 42 U.S.C.A., §1973c, is eminently correct. Finally, it is important to note here, as in the discussion of the Corrupt Practices Act, that the N.D.P.A. candidates, obviously acting in concert, withheld all their certifications of nominations from filing with the Secretary of State and the various Probate Judges until the last moment, submitting names at that time which were in many instances different from the names of those few individuals who had filed declarations of intent. They knew the requirement of the law. They had the advice of counsel. They printed the form, and they belatedly submitted the names of many persons who had no knowledge until that time that this party claimed that they were its nominees. The right of suffrage and of political candidacy is subject to the imposition of non-discriminatory state standards. Reasonable qualifications and restrictions may be imposed, even upon the N.D.P.A. This act serves a legitimate purpose and is due to be upheld.

Appellants make the point that some of their candidates satisfied the provisions of both the Garrett Act and the Corrupt Practices Act. Indeed, some may have. They make this point with particular reference to the candidates who were omitted from the ballot in Greene County, being six candidates for local office. It is worth noting that any compliance that they undertook was compliance as candidates for nomination in the primary election of the regular Democratic Party of Alabama. Presumably, they filed declarations of intent to become candidates in that primary, and designations of themselves to serve as their committees for financial contributions and disbursements, prior to March 1, 1968, in the Probate Office. They designated themselves as members

of the regular Democratic Party of Alabama, seeking to bear its banner as its nominees in the general election. On the same date that it held its primary election—May 7, 1968—they state that they were either participating in or, at least, nominated by a mass meeting of the N.D.P.A. as candidates for those identical offices. (Affidavits of Burton, Knott, Means and Morrow, Appellant's brief, Appendix 27a-36a). Appellees make no point that it was improper for these individuals to seek to become the candidate of two different parties in this fashion, since no statute prevented this type of hedging against loss in one contest or the other. The law, however, is clear in that it requires the individual seeking such a route to identify himself and to advise the appropriate official the name of his finance committee for the stated purpose. The fact is, that when these six individuals submitted their names to the voters of Greene County in the primary, they lost. The further fact is that every qualified voter in Greene County was eligible to vote in the Democratic Primary in which these individuals lost. Appellants acknowledge this. They call Alabama a "no party" state.

The point is that it is very easy to be a political candidate in Alabama and to be placed upon the ballot. This is true whether the individual seeks ballot position as an independent, or whether a party seeks to have its slate placed upon the ballot. The attack upon both the Corrupt Practices Act and the Garrett Act results from the facts that these individuals failed to comply, and they now must maintain that these statutes are unconstitutional in order to prevail. Appellees invite a comparison of the Alabama law with the statutes stricken down in *Williams v. Rhodes*, supra. Candidates for any office as independents can secure ballot position by filing petitions with a very reasonable number of names, far less than one percent of the qualified voters within the electoral area. Political parties may nominate by mass meet-

ings requiring no particular number of persons and having no special format. The primary election procedure itself imposes the most stringent requirements, but it also is available to larger political parties. The point of all this is that it is not a fiction, as the Alabama ballot demonstrates. If this were fictitious, there would not be seven political parties and a group of independent candidates on the ballot. The Appellants are cast in the role, as to the Garrett Act, of having to contend that a law requiring every person who desires to be a candidate, by whatever method, to file his declaration of intent by March 1, should not apply to them. Long-established parties secure no exemption from this requirement. Venerable office holders seeking reelection must comply. No valid reason has been presented, it seems to us, why members of the N.D.P.A. should be excluded. It is remarked that this must occur approximately 250 days before the general election. The point is that it is only 60 days before the date on which all candidates must be nominated, whether by primary or by mass meeting. In the same context, and as a final reference to the Corrupt Practices Act, it is apparent that its accomplishment also is easy, and was as available to Appellants as to any others. It is interesting to note that Appellants stoutly maintain that they should not be compelled to comply with this Act; that the State is estopped from insisting upon compliance; and that they have substantially complied. This "substantial compliance" occurred by a telegram or other communication sent by counsel (who has no right to sign a designation of committee for a candidate), to the various Probate Judges and to the Secretary of State, *after the event* upon which they now rely as constituting an estoppel. If they didn't think that they had to comply, and if they didn't feel that they were in default, why the hurried abortive attempt at compliance?

THE SELECTION OF ELECTION OFFICIALS

In their shotgun attack on Alabama's election laws, Appellants maintain that Code of Alabama, Title 17, §125 illegally discriminates against the candidates of the N.D.P.A. in its provision that the appointment of polling place officials shall be made from the lists presented by the two political parties having received the highest number of votes in the state in the next preceding regular election, if each of said parties presents a list. Presumably, if this provision is constitutionally obnoxious, this Court should somehow find a way for the N.D.P.A. candidates to be placed in the ballot. The two matters actually do not relate. The remedy, in the event of such a finding, obviously would be that some representatives of each party would be required to be designated as polling officials. This, in the words of appellants, would be a less "drastic alternative."

The number of polling officials is limited by law. In the event of numerous parties, all obviously cannot be represented within their number. This does not, however, mean that Appellants or any other party would be deprived under Alabama law of representation at the polls, and that they would thereby be compelled to subject themselves, without any protection, to the evil motives assumed by Appellants for all those who do not agree with them politically. This position overlooks the provisions of Title 17, §126, which grants to all other parties and candidates the right to have watchers at the polls throughout the election and during the count and recapitulation of the ballots following the closing of the polls. The watchers are the special representatives of the party or candidate, while the polling officials represent the public.

Appellants then cite, as being of particular importance, Title 17, §176, with reference to assistance granted to illiter-

ate or handicapped voters. They point to the role of the polling place inspector in such assistance. We point to the fact that this statute provides that the elector requiring assistance "may have the assistance of any person he may select." He may bring that person to the voting place with him.

The contention that the requirement that electors may not remain in the polling place for more than five minutes is bad, likewise is without foundation. This provision represents an obvious effort to enable all electors to vote and to prevent any slowdown at the polls. It must be remembered that the elector having his ballot for five minutes, or being for that period of time in the voting machine booth, marks his ballot or pulls his lever with the assistance of "any person he may select."

THE REQUIREMENT THAT THE NAME OF EACH CANDIDATE SHALL APPEAR BUT ONE TIME ON THE BALLOT, AND UNDER ONLY ONE EMBLEM.

Appellants seem to base their argument that Code of Alabama, Title 17, §148, is unconstitutional on the fact that there were discussions between the N.D.P.A. and the Alabama Independent Democratic Party seeking a possible rapport between these groups with reference to the selection of candidates for presidential elector. An accord was not reached, apparently due at least in part to the fact that the N.D.P.A. wanted to bind members of the Alabama Independent Democratic Party to support the candidates of the N.D.P.A. for local office. Later, when this case was presented to the three-judge court below, counsel for Appellants represented to the court that Appellants were willing to withdraw their candidates for elector and run the Alabama Independent Democratic Party candidates for elector under the N.D.P.A.

emblem, with the result that these same individuals would be listed in two places on the ballot. A special condition of the representation was that Alabama Independent Democratic Party candidates for elector not withdraw their names from the N.D.P.A. list prior to the election, and that the Court would declare Title 17, §148, unconstitutional, with the result that the votes received by these individuals under both columns would be accumulated.

Appellees observe that, although the Alabama statutes are very liberal in allowing parties and independent candidates to secure ballot position, there is no provision for nominations to be made by Counsel in court. At any rate, the course of dealing between the Alabama Independent Democratic Party and the N.D.P.A. points up the fact that these groups were unable to reach an agreement at any point, and the N.D.P.A. now seeks to have the State of Alabama and its officials charged with the execution of its election laws bear the blame.

It might be noted in passing that Appellants have, at every opportunity, emphasized the fact that the candidates for presidential elector nominated by the regular Democratic Party were pledged to support George C. Wallace in the general election. Somehow, these are supposed to be magic words in their behalf. It seems rather obvious that no purpose of those persons who were his supporters could be served by denying N.D.P.A. elector candidates ballot position. The rather apparent effect of their being on the ballot was to dilute the vote of the Humphrey-Muskie ticket, since both the electors of the Alabama Independent Democratic Party and those of the N.D.P.A. had indicated that they would vote for that ticket. Under the provisions of Title 17, §148, these votes were not accumulated. In fact, these electors were

different people on the different slates, and the vote was cast for electors. If a Wallace purpose were being served by Appellees, they would, in this state of affairs, have encouraged the presence of N.D.P.A. electors on the ballot. The plain fact is that Appellees were not attempting to serve the purpose of any candidate or group. They were public officers performing their public duty. They had no ax to grind with the N.D.P.A. Appellants emphasize the fact that many of the persons expected to support their candidates, if on the ballot, were Negroes. This Court knows that Negroes have registered in Alabama in very substantial numbers in recent years, and are qualified electors. If, as Appellants maintain, the alleged establishment in Alabama, and the individual Appellees particularly, were fearful of such vote in the presidential election, this would merely be more reason why their selfish interest would have been served in having the N.D.P.A. remain on the ballot. The impassioned argument of Appellants simply does not fit the facts.

Appellants acknowledge that they have found no federal adjudications of the constitutionality of a statute like Title 17, §148. They cite some California and New York state court decisions in support of their position, but acknowledge that this is the minority view.

The following statement appears at 78 A.L.R. 398:

> "Most of the controversy in the courts on the present question centers around the constitutionality of statutes having for their object the prevention of duplication of a candidate's name on the official ballot. Except in California and New York (the decisions in which have been liberally criticized by some of the other courts), the constitutionality of statutes prohibiting the placing of a

candidate's name more than once upon the official ballots seems to have been uniformly sustained."

THE RIGHT TO VOTE A STRAIGHT TICKET

Appellants contend that the provisions of Code of Alabama, Title 17, §§ 97, 157, were violated, and that this violation is unconstitutional, by the failure to place the "full slate" of N.D.P.A. candidates on the ballot. This "full slate" should be examined briefly. As pointed out in our statement of the case, Appellants nominated no candidates for local office in fifty of Alabama's sixty-seven counties. In four others they nominated only one local candidate. In four others only two local candidates were nominated. This statement should be modified to read that they acknowledge that they had no qualified candidates except these. Had all the N.D.P.A. candidates remained on the ballot, the voting of a straight ticket would, in most instances, have amounted only to voting for some candidates for elector, United States senator and member of the Alabama Public Service Commission. It would have been necessary for the voter, if he desired to participate fully in the election, to vote for other candidates for other positions, with the exception of candidates for Congress in some districts.

The fact is that the option to vote a straight party ticket is only one of several options which Alabama Law ordains for Alabama voters. While Title 17, §157 provides a means for straight ticket voting "if the elector desires to vote a straight ticket," §158 gratifies his wishes if he "desires to vote for a candidate not on his party ticket"; §159 accommodates him if he "desires to vote for candidates on different tickets" when two or more are to be elected to the same office; §160 accommodates him if he "desires to vote a split ticket"; §161 enables him to vote a straight ticket and to

vote for other officers when his straight ticket does not contain names of all officers; and §162 enables him to vote by write-in for persons whose names do not appear on the ballot.

Alabama law creates no "classification of people" of the type under consideration in *Wesberry v. Sanders*, 376 U.S. 1 (1963). Appellants' reliance on *Hopper v. Britt*, 203 N. Y. 144, 96 N. E. 371 (1911), demonstrates the weakness of their position. There was a classification in that case. A statute apparently denied the right to straight ticket voting to parties which had not received a certain specified minimum number of votes in the previous election. Alabama law has no such restriction. The right to vote a straight ticket, or in any other manner, is equally open to all qualified voters. It was open to members of the N.D.P.A. here to vote for any candidates of that party who might be qualified to have their names placed on the ballot. The point is, however, that the right of the elector to vote in a particular fashion cannot be maintained to cause the repeal of every law establishing conditions precedent for qualification as a candidate on the ballot.

The argument that the Voting Rights Act of 1965 was violated by the failure to place N.D.P.A. candidates on the ballot, thereby depriving certain voters of the right to vote a straight ticket *for these candidates* is specious. If the name of a prospective candidate is kept from the ballot for a valid reason, the fact that state law gives a voter options as to the manner in which he casts his ballot can't dictate that the disqualified candidate automatically is qualified, or that the state has, somehow, violated the Voting Rights Act of 1965 for failure to qualify him. The statutory provisions under attack have been the law of Alabama for a long time. The form of ballot is not unique, or even unusual. A greater

number of candidates, an increase in the number of parties, always will add to the length and complexity of a ballot. This condition creates no invalidity in the law of a state. Of course, complete simplicity of the ballot can exist in a police state, where the electors always vote a straight ticket, since there is only one. The efforts of Appellants to build, by argument, a conspiracy to deprive the N.D.P.A. of ballot position does not fit the facts. Their contentions with respect to straight ticket voting are, perhaps, the weakest of all.

CONCLUSION

Appellants attempt to have this Court focus on such matters as the Wallace candidacy for president and the failure of the N.D.P.A. and the Alabama Independent Democratic Party to reach an accord, in an effort to secure ballot position for individuals who have failed to meet the requirements of valid laws, equally enforced. The thing that they actually seek is a declaration that the law does not apply to them. They ask this Court to strike down in the twinkling of an eye at a very late date, every statute with which they failed to comply. They deferred filing their certifications of nomination to the point where any refusal of public officials to certify nominees for ballot position would be given judicial test under the pressure of time. The fact remains, however, that the wholesale accusations of devious motives and improper actions on the part of Appellants are not borne out, and the statutes under attack are manifestly non-discriminatory, serving a purpose legitimately within the power of the state to serve.

The decree appealed from upholds the constitutionality of these statutes, does not find them to have been applied in an unconstitutional manner and finds that they do not violate

the Voting Rights Act of 1965. It does not decide what the opinion refers to as "the various factual disputes of the parties which do not relate to those federal constitutional questions, and the various issues purely of state law."

The decree appealed from is due to be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that I have served a copy of the foregoing Brief of Appellees on Honorable Charles Morgan, Jr., 5 Forsyth Street, N. W., Atlanta, Georgia 30303, Honorable Orzell Billingsley, Jr., 1630 Fourth Avenue, North, Birmingham, Alabama 35203, and Honorable George W. Dean, Jr., P. O. Box 248, Destin, Florida, Attorneys for Appellants, and upon Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C., Attorney for *amicus curiae,* and Honorable Perry W. Hubbard, P. O. Box 2427, Tuscaloosa, Alabama 35401, Attorney for James Dennis Herndon, by mailing the same to them at their respective offices, postage prepaid.

This the 15th day of January, 1969.

Of Counsel for Appellees

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

SALLIE M. HADNOTT, ET AL., Plaintiffs,	)	
vs.	)	CIVIL ACTION
MABEL S. AMOS, as Secretary of State of the State of Alabama, ET AL., Defendants.	)	NO. 2757-N

Before GODBOLD, Circuit Judge, JOHNSON and PITTMAN, District Judges.

PER CURIAM:

This suit is an effort to secure places for more than 100 candidates of the National Democratic Party of Alabama (NDPA) on the ballots to be used in the general election to be held in Alabama on November 5, 1968. Numerous provisions of the election laws of Alabama are challenged as unconstitutional on their faces, applied in an unconstitutional manner, and in conflict with the Voting Rights Act of 1965, 42 U.S.C.A., § 1973-73p. A three-judge district court has been convened under 28 U.S.C.A. § 2281. Notice of suit has been given to the Attorney General and Governor of Alabama, 28 U.S.C.A. § 2284(2).

We hold that the plaintiffs properly bring this suit as a class action, and that the defendant Edward A. Grouby properly represents a class of defendants composed of the Judges of Probate of all counties in Alabama. The plaintiffs'

motion to file a second amendment to their complaint is granted.

To minimize the difficult problems which this controversy creates for public officials, candidates, and voters and to protect the interests of all insofar as possible this court entered a temporary restraining order on September 18, 1968, which is still in effect, directing that the NDPA candidates be certified by the Secretary of State as candidates, or included as candidates by Judges of Probate, as appropriate for the particular office sought.[1] The case is now submitted to us for decision on the application for a temporary injunction and on the merits for a final decree. We have considered the pleadings, many depositions of witnesses, voluminous documents, and other evidence, numerous briefs, and oral arguments by counsel.

This court, acting through a single judge, and through three judges, has not been reluctant to protect constitutional rights relating to the voting process.[2] Once this three-judge

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[1] In Alabama ballots are printed by each county for use in that county only, under the supervision of the county Judge of Probate. He must cause to be printed upon the ballot the names of all candidates who have been put in nomination and certified to him not less than 60 days previous to the day of election. Certificates of nomination for persons to be voted on state-wide, or by an entire Congressional district, judicial circuit or senatorial district, for any state or federal office, must be filed with the Secretary of State, who certifies to the Judges of Probate of the respective counties affected the names of such nominees and the offices for which nominated. Certificates of nomination for offices to be voted on by a single county are filed directly with the Judge of Probate of the county. Ala. Code (1958), Tit. 17, §§ 145, 168.

[2] E.g., United States v. Alabama, 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge court); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court); United States v. Parker, 236 F. Supp. 511 (M.D. Ala. 1964); United States v. Cartwright, 230 F. Supp. 873 (M.D. Ala. 1964); United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962); Sellers v. Wilson, 123 Supp. 917 (M.D. Ala. 1954).

court acquired jurisdiction of the present case by reason of an injunction being sought against enforcement of state statutes on substantial federal constitutional grounds, we acquired jurisdiction over all the claims raised in the case, state and federal.[3] But it does not follow that because a constitutional issue concerning voting or elections is properly presented to the court it necessarily should decide every contention and issue not of a federal constitutional nature which all the parties may raise about the election. This court, exercising its discretion, decides only the substantial issues concerning the Constitution of the United States. *United Mine Workers v. Gibbs*, 383 U.S. 715, 16 L.Ed. 2d 218 (1966).

2. The Corrupt Practices Law

Plaintiffs attack as unconstitutional on the face and as applied to them and their class the provisions of Tit. 17 §§ 274-275, Ala. Code (1958).[4] These sections are part of a

[3] E.g., Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960).

[4] "§ 274. **Committee to receive, expend, audit and disburse money or funds contributed.** — Within five days after the announcement of his candidacy for any office, each candidate for a state office shall file with the secretary of state, and each candidate for a county office or the state house of representatives shall file with the judge of probate of the county, and each candidate for a circuit or district office, including the state senate, shall file with the judge of probate of each county which is embodied in said circuit or district, a statement showing the name of not less than one nor more than five persons elected to receive, expend, audit, and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such persons to act as such committee, but any candidate, if he sees fit to do so, may declare himself as the person chosen for such purpose. If the statement required herein shall have been postmarked at any United States post office not later than midnight of the fifth day after the announcement of his candidacy, the candidate shall be deemed to have complied with the requirements of this section as to filing such state-

comprehensive state Corrupt Practices Law enacted by the Alabama legislature in 1915. Section 272 establishes the maximum amounts that various candidates may spend in their races. Section 277 requires that contributions made for or on behalf of the candidate be made to the committee named under § 274. Under § 279 the Committee must, within 30 days after the election, file (with the Secretary of State or the Judge of Probate, depending on the office sought) an itemized sworn statement of expenditures and contributions. Under § 281 these are public documents, open to inspection by any citizens. If the post-election statement is not made the candidate may not be certified as nominated or elected even though otherwise successful. Tit. 17, § 281.

The state has a legitimate interest in seeking to supervise spending in political campaigns. We have no illusions about the Corrupt Practices Law working perfectly. The

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ment within five days after the announcement of his candidacy. Such committees shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee; he shall keep detailed account of receipts, payments and liabilities. The said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed, or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. If any vacancies be created by death or resignation or any other cause on said committees, said candidate may fill such vacancies, or the remaining members shall discharge and complete the duties required of said committee as if such a vacancy had not been created. Non candidate for nomination or election shall expend any money directly or indirectly in aid of his nomination or election except by contributing to the committee designated by him as aforesaid. (1915, p. 250; 1959, p. 1036, appvd. Nov. 13, 1959).

"§ 275. **Candidate acting as own committee.** — Any person who shall act as his own committee shall be governed by the provisions of this article relating to committees designated by candidates. Failure to make the declaration of appointment or selection by any candidate as herein required is declared to be a corrupt practice, and in addition the name of such candidate so failing shall not be allowed to go upon the ballot at such election. (1915, p. 250.)"

proliferation of committees other than those named by the candidate himself is a fact of political life in Alabama. But the requirement that the candidate himself designate a committee is an appropriate and reasonable means by which the state may seek to achieve a legitimate end.[5]

Plaintiffs claim that disqualification of the candidate is an excessively harsh penalty for violation of § 274, and therefore an unconstitutional deprivation of due process of law, because less drastic alternatives are available, citing *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 95 L.Ed. 329 (1951), *Sherbert v. Verner*, 374 U.S. 398, 10 L.Ed. 2d 965 (1963) and *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed. 2d 510 (1965). Section 275 provides for two penalties when the candidate fails to designate his finance committee —the failure is declared a corrupt practice, and his name "shall not be allowed to go upon the ballot." One guilty of a corrupt practice is guilty of a misdemeanor and must be fined not more than $500 and also may be imprisoned at hard labor for not more than six months. Tit. 17, § 332. Disqualification of the candidate is a direct and readily available means of securing compliance. But the remedy of refusing the candidate a place on the ballot has been employed repeatedly.[6] We cannot accept the argument of plaintiffs that a criminal penalty is an alternative so much more desirable that it renders unconstitutional the remedy of denial of

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[5] In Bottomly, John S., **Corrupt Practices in Political Campaigns**, 30 Boston Univ. L. Rev. 331 (1950) the corrupt practices statutes of most of the states were tabulated. At that time 36 states authorized non-criminal sanctions of denial of a place on the ballot or disqualification for or denial of the office, for various violations of their corrupt practices statutes. Eleven states are shown as authorizing denial of a place on the ballot.

[6] E.g., Herndon v. Lee, 281 Ala. 61, 199 So. 2d 74 (1967); Jones v. Phillips, 279 Ala. 354, 185 So. 2d 378 (1966); Owens v. Heartsill, 279 Ala. 359, 185 So. 2d 382 (1966); cf. McCutcheon v. Thomas, 261 Ala. 688, 75 So. 2d 649 (1954); Rep. of Atty. Gen. of Ala., 1934-36, p. 611.

a place on the ballot, or that alone it is even an effective alternative. The undesirability of criminal action as the sole remedy is shown by the present case. The great majority of the NDPA candidates seek relatively minor local offices, are candidates for the first time, and are claimed to be in most instances unfamiliar with election laws and of procedures required of them, and in some instances unaware of their nominations. The suggestion that all of them are to be exposed to criminal action is not tenable.

Nor can we accept the contention that it is constitutionally impermissible to enforce the penalty of denial of a place on the ballot unless the candidate is guilty of fraud or intent to defraud. This misconceives the purpose and effect of the finance committee requirements, which provide for a publicly designated agency through whose hands funds are received, disbursed and audited, and whose statements are filed and open for public inspection. The emphasis is on the spotlight of available public scrutiny.[7]

The Alabama courts uniformly, though at times reluctantly,[8] have enforced violations of §§ 274-275 as mandatory if raised in a direct proceeding prior to the election. *Herndon v. Lee, supra; Jones v. Phillips, supra; Owens v. Heartsill, supra; cf. Garrett v. Cunningham, supra,* though only directory if raised after the election. Section 275 has not been amended since its enactment in 1915. Both sections were reenacted in 1940. Section 274 was amended in 1959 to clarify the filing of committee designations by candidates for the state legislature and the measurement of the five-day

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[7] In Jones v. Phillips, **supra,** the Alabama Supreme Court noted that "corrupt" as used in the Corrupt Practices Act did not brand the candidate who failed to comply as personally corrupt in the generic sense of evil or fraudulent. **Accord,** Vickery v. King, 281 Ala. 303, 202 So. 2d 148 (1967).

[8] **See** Jones v. Phillips, 185 So. 2d at 381.

period. The mandatory penalty was not changed. "This [the requirement of filing the appointment of a finance committee] was just as much a part of his qualification as a candidate as was the paying of his qualification fee to the proper chairman of his party." *Jones v. Phillips*, 185 So. 2d at 380.

When the Secretary of State declined to certify to the Judges of Probate NDPA candidates who filed nominations in her office she did not assert failure to comply with the Act as one of her motivations. Her motivation is irrelevant to a judicial determination of whether the Act is constitutional on its face.

The court holds that §§ 274-275 are not unconstitutional on their faces.

No unconstitutional application of the Corrupt Practices Law by selective enforcement has been proved with respect to the NDPA candidates, for filings with the Secretary of State or filings with the Judges of Probate. Selective enforcement could arise from back-dating committee designations filed late or from failure by the Secretary of State or the Judges of Probate to deny certification or a place on the ballot to candidates other than the plaintiffs' class who either did not file or filed late. As to the former, there is no evidence of any practice in the offices of the Secretary of State or any one of the 67 Judges of Probate of accepting late filings as timely. The evidence as to the Secretary of State is that filing dates are carefully watched and late filings not accepted.

As to the latter—selective application of the penalty—we are asked to infer that there is enforcement with an uneven hand by the fact that in this lawsuit the defendant

state officers assert that members of the plaintiff class are not entitled to a place on the ballot because of failure to comply with § 274. This misconceives both the duties of this court and the facts. The plaintiffs seek an affirmative injunctive order requiring that their class be put on the ballot. As a prerequisite to that relief at the hands of the court they must show that they are qualified to be on the ballot. From the beginning this court has made it clear that if it, rather than state officers, was to be an instrumentality for placing names on the ballot, then in the discharge of that duty it wanted to order no names put on—if it ordered any—except those of qualified candidates. The actions of the parties are not the measure of the court's own obligation to enforce laws, if valid, that are for the benefit not of the parties or a few public officers but of the public at large.[9]

Turning to the facts, designations of finance committees are filed with the Secretary of State or Judges of Probate.[10] There is no substantial evidence of lack of compliance by other candidates with §§ 274-275 in this or any other election, nor of any custom or practice by state officers at state or county level, of not acting thereon. All, or most, of the handful of reported cases in the Alabama Supreme Court are suits brought by candidates or voters to force the public officer concerned to deny a place on the ballot to a non-

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[9] To that end at the hearing on temporary restraining order the court directed defense counsel to notify plaintiffs' counsel of any reasons other than those raised in this suit and known to the defendants why any members of the plaintiffs' class did not qualify for the offices sought.

[10] The offices sought by a great majority of the NDPA candidates are such that they deal with Judges of Probate in election matters, including filing in the appropriate county probate offices the designations of finance committees. The Secretary of State is a candidate for presidential elector, which causes us to examine her acts with unusually careful scrutiny. The Judges of Probate are not such candidates.

complying candidate. But the extent of enforcement, or lack of enforcement, by routine administrative action which reaches neither courts nor newspapers, or by legal action in the circuit courts, is not proved, either as to the office of the Secretary of State or as to any one or more of the 67 Judges of Probate. There is no evidence of practice, consistent or otherwise, or that this is the first time the Corrupt Practices Law has been invoked at either state or county level.[10a] We We cannot find a law unconstitutional on the presumption, unproved assumption, or guess, with respect to other non-complying candidates, in this or other years, that the Secretary of State and the Judges of Probate have followed a consistent practice of not performing their duties.

The requirements of §§ 274-275 do not violate the Voting Rights Act of 1965, 42 U.S.C.A. § 1973. The requirement of designating a finance committee is not a "test or device" prerequisite for voting or registration under § 1973(b). We need not decide whether it is a "standard, practice, or procedure with respect to voting" under § 1973(c), because it was in existence before November 1, 1964.[11]

Therefore, the court declares that §§ 274 and 275 of Tit. 17 are not unconstitutional on their faces, are not proved to be unconstitutional in their application, and are not violative of the Voting Rights Act of 1965.

3. The Constitutionality of the Garrett Act

The Garrett Act, Act No. 243 of the Alabama legislature, 1967 Special Session, adopted May 11, 1967, prohibits the cannot infer selective enforcement under these circumstances.

[10a] The Reports of the Attorney General of Alabama reveal that from time to time Judges of Probate have sought his official opinion with respect to non-compliance and putting names on the ballot. Rep. of Att'y. Gen. of Ala. 1934-36, p. 611; Jan.-Mar. 1940, at 360.

[11] See cases cited in text at note 14, infra.

Secretary of State (for state, district and federal offices) from certifying and the Judge of Probate (for county offices) from causing to be printed on the ballots for a general election the name of a candidate who does not file a declaration of intention to become a candidate for such office on or before the first day of March of the year in which the general election is held. If the declarant is a candidate for nomination by a political party he must designate the party whose nomination he seeks; otherwise he must state that he will be an independent candidate for the office.

The requirement of the statement of intent must be viewed in context as a part of the complete Alabama electoral process.

Alabama provides for nomination of candidates to run in the general election by primary, party convention, mass meetings, and petitions. Also the ballot in the general election is required to provide space for write-in ballots for any other persons for whom the voters desire to cast ballots. Tit. 17, § 155.[11a]

The first Tuesday in May is a key date in all the processes of nomination for which Alabama law provides. Primary elections are held on the first Tuesday in May. Tit. 17, § 340.[11] If a party nominates by mass meeting it must hold its meeting on the first Tuesday in May at or in the vicinity of a polling place. Tit. 17, §§ 413-414. One nominated by petition must

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[11a] None of these procedures is new, all having been in effect for many years.

[11] A party which cast more than twenty per cent of the vote in the last general election in the state, or in the county, must hold a state, or county, primary unless it files with the Secretary of State its election not to do so at least 60 days before the date of the primary. A choice so made may not be changed until after the next general election. Tit. 17, § 336-337.

file his petition with the Secretary of State or Judge of Probate, as appropriate; before the first Tuesday in May. Tit. 17, § 145. Delegates to the convention of a party which will nominate by convention are chosen at meetings on the first Tuesday in May. Tit. 17, §§ 413-414.

One desiring to be a candidate in the primary must file his declaration of candidacy with his party by March 1. Tit. 17, § 348. This keys in with the requirement of §§ 336-337, referred to above, that a party which by reason of its voting strength is within the primary law must act by 60 days before the first Tuesday in May if it wishes to use another method of nomination.

Prior to the Garrett Act there necessarily was considerable prenomination activity before the first Tuesday in May, which required or tended to require commitment of intent before that date though not necessarily on the same day and not in all instances as early as March 1. The candidate who sought nomination by primary declared with his party by March 1 and historically was campaigning until early May. Those seeking nomination by mass meetings would have to seek support for votes also to be cast on the first Tuesday in May but cast in a mass meeting rather than by a primary ballot, and one seeking nomination by petition would have to obtain the required signatures in order to file the petition on time. And the person seeking nomination by convention would have to find, and elicit support for, favorable delegates who would be chosen at mass meetings held on the first Tuesday in May.

The Garrett Act adds to this nominating system the requirement that all candidates state their intent by March 1, by filing a statement of intent (except for one seeking nomination by primary, and his declaration with his party serves in lieu of the statement of intent).

The Alabama electoral system does not reserve the ballot for established major parties and exclude minor ones. There are seven parties on the November general election ballot.[13] This general election ballot is neither unique nor even unusual. No certain number of persons is required to constitute a party. No particular formality of organization is required. There need not be a statewide organization or affiliation with a national party or national convention. To be nominated by petition as an independent candidate for a state or federal office one needs only 300 signatures, for a county or municipal office only 25 signatures. Tit. 17, § 145.

Thus the Garrett Act is not a part of a pervasive system or scheme to keep minor parties and independents off the ballot and reserve the political domain for the two major parties.

There is no evidence that enactment of the Garrett Act was in any degree racially motivated or directed at NDPA. The only evidence before us tends to show what is generally accepted as the reason for its enactment, that it was intended to correct what the legislature viewed as an inequity against a party nominating by primary (presently only the Democratic Party statewide; there are Republican primaries in some counties), arising from the fact that primaries nominating by other methods could hold back deciding upon candidates and selectively choose and place their candidates against the nominees or potential nominees by primary who appear most vulnerable.

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[13] Alphabetically they are: Alabama Independent Democratic Party, American Independent Party of Alabama, Democratic Party, Prohibition Party, Republican Party, The Alabama Conservative Party, The National Democratic Party of Alabama. Five are running full slates of ten candidates for presidential electors. One is running a partial slate.

Viewed in the framework of the total Alabama electoral system the establishment of a fixed time of March 1, 60 plus days from May 7, for all candidates to commit themselves is not constitutionally impermissible. Certainly there is no constitutional right vested in voters or candidates that all parties and candidates begin the formal electoral process with the same starter's gun. But there is no constitutional prohibition against a state legislature's requiring by reasonable means, as an incident to what it deems fair, orderly and effective election machinery, that all candidates must begin the formal election process by a fixed date.

Plaintiffs appear to contend that time alone is an independent vice which makes March 1 a constitutionally impermissible date, bearing in mind especially the length of time from March 1 until November. If time were unrelated to orderly, fair, and nonexclusory nominating procedures, or were a part of an overall exclusory system or scheme, the argument would have more force. Plaintiffs rely on *Williams v Rhodes* and *Socialist Labor Party v. Rhodes*, Cir. No. 68-224 and 68-225 (S.D. Ohio, Aug. 29, 1968), decided by a three-judge district court in Ohio on August 29, 1968, argued to the Supreme Court on October 7, 1968. Those cases were concerned with Ohio election laws. By a series of legislative enactments Ohio had changed its previous election laws (allowing nomination by primary and by petition, and allowing write-in votes) so as to effectively eliminate from its electoral processes all minority parties and independent candidates and also abolish write-in ballots, thereby keeping the political arena for the Democratic and Republican parties. Only presidential electors were involved. In connection with its discussion of the impossibility of qualifying independent candidates for presidential electors, and against the backdrop of impossibility of getting a minority party on the ballot, the

court described as unreasonable the requirement that a petition for nomination to state office as an independent must be filed 90 days before the primary election. The time element was a part of an overall system, exclusory in purpose and exclusory in effect.

Those political groups in Alabama more formally and more permanently organized and familiar with election procedures will find compliance with the statement of intent law easier than those who are not. But this difference alone presents no constitutional infirmity. The same problem will exist with regard to any requirements of the election laws regardless of the details of the electoral machinery provided by the state.

Some of the advantages of early and clear-cut declarations of intent are demonstrated by this case, especially in view of the time problem of sending absentee ballots to persons in the military service. When this suit was filed there still was widespread confusion over which offices some of the NDPA candidates were seeking and whether some of them could qualify for those offices for reasons unrelated to this suit. As a result of the initial hearing before this court on issuance of a temporary restraining order a number of NDPA candidates were conceded to be not qualified and were dropped as claimants for places on the ballots. The uncertainties have been reduced but not eliminated.[11] The state and the voters have an interest in a procedure which properly

[11] The NDPA leadership knew of the requirements of the Garrett Act prior to March 1, 1968, and advised party members of the necessity of compliance. The NDPA state headquarters notified county chairmen to have members file statements of intent. Some did and some did not. NDPA was advised by counsel, and its counsel either obtained or prepared for NDPA use statement of intent forms (which included designation of a finance committee) which were distributed to party representatives throughout the state.

observed may tend to filter out some of the mistakes, pitfalls and misunderstandings early rather than late.

The Garrett Act is not a "voting qualification or prerequisite to voting" or a "standard, practice or procedure with respect to voting" within the meaning of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973c. *See Whitley v. Johnson*, 12 Race Rel. L. Rep. 2031 (S.D. Miss. 1967) (three-judge court); *Bunton v. Patterson*, 281 F. Supp. 918 (S.D. Miss. 1967); *Fairley v. Patterson*, 282 F. Supp. 164 (S.D. Miss. 1967).[13] *Compare Sellers v. Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966) (three-judge court).

Therefore, the Court declares that the Garrett Act, Act No. 243 of the Alabama Legislature, 1967 Special Session, is not unconstitutional on its face, is not proved to be unconstitutionally applied, and is not in violation of the Voting Rights Act of 1965.

4. The disqualification of candidates by the Secretary of State on the ground of failure to conduct a mass meeting in Huntsville.

The Secretary of State declined to certify to the Judges of Probate the names of most of the NDPA candidates required to be voted on by the entire state, or by a congressional district, judicial circuit or senatorial district. Her asserted grounds were two, failure to comply with the Garrett Act, which we have dealt with above, and the possession by her of information indicating that NDPA had not held a mass meeting in Huntsville May 7, 1968. (Huntsville was one of many places throughout the state at which NDPA was seek-

[13] These cases have been consolidated and set for argument before the Supreme Court, with questions of jurisdiction postponed until the hearing on the merits. 36 U.S.L. Week 3334, 3383, 3473 (1968).

ing to hold mass meetings on May 7.) The information consisted of a letter from two residents of Huntsville who had no personal knowledge of whether the mass meeting was held; accompanied by affidavits of two persons containing "evidence" of the most slender nature, largely circumstantial and in part hearsay, attempting to negative the certification that the meeting had been held.

The matter furnished the Secretary of State authorized her to make inquiry to ascertain if the statute had been complied with. *Kinney v. House*, 243 Ala. 393, 10 So. 2d 167 (1942); Report of Attorney General of Alabama, 1934-36, at 4. Instead she directed NDPA to show cause why it should not be removed from the ballot, and, after it had filed various supplemental data, declined to certify its candidates, with two exceptions.[18]

The refusal to certify candidates on the basis of the letter and affidavits was a violation of basic principles of equal protection, due process and essential fairness. This is so with regard to candidates certified as nominated at the Huntsville meeting and those nominated at the state convention as well. The same documents were, along with failure to file statements of intent, the basis for the refusal of the Secretary of State to certify candidates nominated at the state conventions of NDPA, held on July 20, 1968.

We do not decide the complex factual issues of whether mass meetings, including the Huntsville meeting, were held and whether candidates purportedly nominated at such meetings were validly certified. We do hold that the action of the Secretary of State in denying certification to NDPA candidates, insofar as it was based on alleged failure to hold the

[18] Why there were two exceptions is not made clear to this court.

Huntsville meeting, was unconstitutional. We also hold that the alleged failure to hold the Huntsville meeting cannot be the basis for any Judge of Probate denying a place on the ballot to any NDPA candidate, if the only evidence supporting such basis is the letter and affidavits above described. Those documents do no more than give cause for inquiry by Judges of Probate or the Secretary of State as the case may be. They may not alone be the cause of denial of a place on the ballot.

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We find no merit in the claims that Tit. 17, § 148, providing that the name of a candidate may appear on the ballot only one time and under one party emblem, is unconstitutional and in violation of the Voting Rights Act of 1965. Nor do we find any constitutional infirmity in Tit. 17, § 125, relating to appointment, under designated circumstances, of election officials from the two political parties having received the highest number of votes at the last election.

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The Attorney General and the Secretary of State have duties with respect to the general election, and they and the Governor have duties regarding the vote of persons elected as presidential electors. These three state officers are candidates for presidential electors. Plaintiffs claim that a situation of adverse interest is created which violates the Constitution of the United States and § 280 of the Constitution of Alabama, which forbids the holding of two state offices for profit at the same time. We perceive no violation of the United States Constitution. The office of presidential elector is a state office. *Ray v. Blair*, 343 U.S. 214, 96 L.Ed. 894 (1952), *Re Green*, 134 U.S. 377, 36 L.Ed. 951 (1890); *Walker*

v. United States, 93 F. 2d 383 (8th Cir.), *cert. denied*, 303 U.S. 644 (1938). Whether § 280 of the Alabama Constitution has been infringed is a matter of state law.

Having disposed of the substantial federal constitutional questions we decline to decide the various factual disputes of the parties which do not relate to these federal constitutional questions, and the various issues purely of state law.

Pursuant to Rule 52, Fed. R. Civ. P., this opinion constitutes the findings of fact and conclusions of law of the court. Judgment will be entered accordingly.

DONE this the 10th day of October, 1968.

JOHN GODBOLD
UNITED STATES CIRCUIT JUDGE
VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

HADNOTT VS. AMOS
CIVIL ACTION NO. 2757-N
JUDGE FRANK M. JOHNSON, JR., dissenting.

I must respectfully dissent from the majority's holdings that the Corrupt Practices Law was not applied unconstitutionally to the NDPA in this case and that the Garrett Law is constitutional on its face, and, therefore, from the conclusion that some or all of the NDPA candidates are not entitled to a place on the November ballot.

I. THE CORRUPT PRACTICES LAW

I fully concur in the majority's holding that the Alabama Corrupt Practices Law is constitutional on its face. The law

is a reasonable approach to a difficult problem. Although disqualification of the candidate for noncompliance is a drastic remedy, the legislature might well conclude that such a remedy is necessary to foster voluntary compliance.

The best of laws, however, can be invoked in an unworthy manner. Here, it was invoked strictly as an afterthought. As the majority concedes:

> "When the Secretary of State declined to certify to the Judges of Probate NDPA candidates who filed nominations in her office, she did not assert failure to comply with the Act as one of her motivations. Her motivation is irrelevant to a judicial determination of whether the Act is constitutional *on its face.*" (Emphasis added.)

The Corrupt Practices Act has not fallen into disuse. Nor, as the cases cited by the majority indicate, has the remedy of disqualification. In all these cases, however, the Act was invoked by opposing candidates or by concerned voters. Alabama State officials having adopted a consistent practice of relying on party and public policing and enforcement of this Act, it is not tolerable for this Court to allow these officials to make their first foray in the enforcement direction against a small, new, and almost surely impecunious group of candidates seeking to form a new party in Alabama. This is particularly true when the defendant officials who are taking such action are candidates for Presidential electors on the ballot of an opposing party. Whether or not a formal conflict of interest, this circumstance, when conjoined with those above, justifies the inference that the Corrupt Practices Act, fair on its face, has been:

> "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make

unjust and illegal discrimination between persons in similar circumstances. . . . ." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

In this vital area of the right to vote and to run for office, the courts must not hesitate to exercise their judicial duty to ensure an evenhanded application of the Alabama election laws.

II. THE GARRETT LAW

The Garrett Law requires that candidates for office file a declaration of intention to run on or before the first day of March of the year in which the general election is held.

Although a state might reasonably require a candidate to file sufficiently in advance of the election to permit administrative preparations, defendants do not contend that such a purpose *would require eight months' notice.* Indeed, as the majority recites, it is generally accepted that the Garrett Law:

> "was intended to correct what the legislature viewed as an inequity against a party nominating by primary (presently only the Democratic party), arising from the fact that parties nominating by other methods could hold back deciding upon candidates and selectively choose and place their candidates against the potential nominees by primary who appear most vulnerable."

Protection of one political party from another political party is not a permissible object of legislation. Even if it be thought permissible, it would scarcely justify the adverse impact which this statute has on the right to an effective vote for the candidate of one's choice. Here, the process of

choice of candidates is cut off at an unreasonably early date. The candidates who seek relief from this Court find themselves in almost precisely the situation George C. Wallace found himself in by reason of an Ohio law that required a petition for nomination to state office (presidential electors) be filed at least 90 days before the primary election rather than the general election. In an action by these Wallace electors a three-judge Federal Court sitting in the Southern District of Ohio,[1] stated:

> "This is an unreasonable requirement. The time is now past when petitions for the nomination of independent candidates for presidential electors supporting George C. Wallace could be filed, even ninety days before the November election.
>
> "Plaintiffs concede that the State has a legitimate interest in, and a right to, an effective and efficient electoral process, thus giving the State the right to impose reasonable restrictions for legitimate purposes, after due consideration of cost, convenience and administrative burdens. On the other hand defendants have conceded that the Ohio Election Laws, as they now stand, do constitute an impairment, though it was termed 'insubstantial', of plaintiffs' right to vote. In this context the judicial focus must be centered upon ascertaining whether this impairment is constitutionally permissible.
>
> "We begin with the principle that
>
> > " 'No right is more precious in a free country than that of having a voice in the election of those who

[1] **Socialist Labor Party, et al. v. Rhodes, et al.**, U.S.D.C. S.D. Ohio Civil Action No. 68-224; opinion not yet published but rendered and filed August 29, 1968.

make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our constitution leaves no room for classification of people in a way that unnecessarily abridges that right.' *Wesberry v. Sanders*, 376 U.S. 1, 17-18.

Also, it is clear that the right of suffrage is subject only to the imposition of state standards which are not discriminatory. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), and *Gray v. Sanders*, 372 U.S. 368 (1963). The United States Supreme Court has recognized the power of the state to impose reasonable qualifications and restrictions, but has declared that these had to be established on a non-discriminatory basis and that the classifications drawn into the statutes had to be reasonable in light of their purpose. *Carrington* v. *Rash, supra.* 'We deal here with matters close to the core of our constitutional system.' *Carrington* v. *Rash, supra,* at page 96. The right to choose that courts have been so zealous to protect means at the least that states may not casually deprive a class of individuals of the vote or the right of an individual to seek political office because of some remote administrative benefit to the state.

"The attention of this Court has been centered on whether the Ohio Election Laws, to the extent that these laws prevent the qualification of political parties and their candidates for ballot position, satisfy the tests of 'necessity,' 'equality,' and 'reasonableness.' As evidenced both on the face of these statutes as well as in their operational effect, the restrictions imposed do not meet these tests. These restrictions are violative of the equal pro-

tection clause of the Fourteenth Amendment and are thus constitutionally impermissible.

"We conclude that to the extent that the Ohio Election Laws impose unreasonable restrictions on the qualifications of political third parties, restrict minority participation in Ohio's electoral process, prevent candidates for president and vice-president from qualifying as independents and deprive plaintiffs of their right of suffrage, either by denial of ballot position or effective write-in, they are unconstitutional and void."

If the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is invoked to protect the interests of presidential electors seeking to run as candidates for George C. Wallace's Third Party in the State of Ohio, it can be and must be applied to protect the interests of these Negro and white candidates in the State of Alabama. Indeed, the Alabama Election Law now under scrutiny by this Court that the majority holds is not unconstitutional in its application or on its face requires a declaration of candidacy some eight months prior to the general election. To me, this is constitutionally unreasonable and therefore impermissible. I, therefore, dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

SALLIE M. HADNOTT, ET AL., Plaintiffs,	)	
vs.	)	CIVIL ACTION
MABEL S. AMOS, as Secretary of State of the State of Alabama, ET AL., Defendants.	)	NO. 2757-N

Before GODBOLD, Circuit Judge, JOHNSON and PITTMAN, District Judges

DECREE

The court having entered its memorandum opinion containing its findings of fact and conclusions of law, it is, therefore,

CONSIDERED, ORDERED, ADJUDGED and DECREED as follows:

1. Tit. 17, §§ 274-275, Code of Ala. (1958), a part of the Alabama Corrupt Practices Law, is not unconstitutional on its face, has not been proved to be unconstitutionally applied, and does not violate the provisions of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973-73p.

2. The Garrett Act, Act No. 243 of the Alabama legislature, 1967 Special Session, is not unconstitutional on its face, has not been proved to be unconstitutionally applied, and does not violate the provisions of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973-73p.

3. The refusal by Mabel S. Amos, Secretary of State of the State of Alabama, to certify NDPA candidates insofar as it was based upon the letter and the affidavits described in the opinion of the court, was a violation of equal protection of the laws and of due process, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

4. The alleged failure of NDPA to hold a mass meeting in Huntsville, Alabama, on May 7, 1968, may not be the basis for any Judge of Probate denying a place on the ballot to any NDPA candidate, if the only evidence supporting such basis is the letter and affidavits described in the opinion of the court.

5. Tit. 17, § 125, Code of Ala. (1958), is not unconstitutional on its face, is not proved to be unconstitutionally applied, and is not in violation of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973-73p.

6. Tit. 17, § 148, Code of Ala. (1958), is not unconstitutional on its face, is not proved to be applied in an unconstitutional manner, and does not violate the Voting Rights Act of 1965.

7. The prayers for temporary and permanent injunctions are denied. The temporary restraining order entered on September 18, 1968, is dissolved.

Costs are taxed one-half against the plaintiffs and one-half against the defendant Mabel S. Amos, Secretary of State of the State of Alabama.

DONE this the 10th day of October, 1968.

JOHN GODBOLD
UNITED STATES CIRCUIT JUDGE
VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

§ 125. (442) (352) (1595) Political parties furnish lists from which appointments are made.—Each political party or organization having made nominations may, by the chairman of its state or county executive committee or nominees for office, furnish the appointing board a list of not less than three names of qualified electors from each voting place, and from each of said lists an inspector and clerk shall be appointed for each voting place; provided, that where there are more than two lists filed, the appointments shall be made from the lists presented by the two political parties having received the highest number of votes in the state in the next preceding regular election, if each of said parties present a list.

§ 126. (443) (353) Watchers; how appointed and their duties.—Each political party or organization having candidates nominated may, by the chairman of the county executive committee or nominees for office or beat committeeman, name a watcher who shall be permitted to be present at the place where the ballots are cast from the time the polls are opened until the ballots are counted and certificates of the result of the election signed by the inspectors. The said watcher shall be permitted to see the ballots as they are called during the count. The watcher shall be sworn to faithfully observe the rule of law prescribed for the conduct of elections.

§ 145. (462) (372) (1606) Names of candidates placed on ballots; certificate of nomination.—The probate judge of each county shall cause to be printed on the ballots to be used in their respective counties, the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, primary election, or other assembly of any political party or faction in this state, and certified in writing

and filed with him not less than sixty days previous to the day of election. The certificate must contain the name of each person nominated and the office for which he is nominated, and must be signed by the presiding officer and secretary of such caucus, convention, mass meeting, or other assembly, or by the chairman and secretary of the canvassing board of such primary election.

In case of a person to be voted for by the electors of the whole state or of an entire congressional district, judicial circuit, or senatorial district for any state or federal office, the certificate of nomination must be filed in the office of the secretary of state not less than sixty days before the day of election; and the secretary of state must thereupon immediately certify to the judge of probate of each county in the state, in case of an officer to be voted for by the electors of the whole state, and the judges of probate of the counties composing the circuit or district, in case of an officer to be voted for by the electors of a circuit or district, upon suitable blanks to be prepared by him for that purpose, the fact of such nomination and the name of the nominee or nominees and the office to which he or they may be nominated.

The judge of probate shall also cause to be printed upon the ballots, the name of any qualified elector who has been requested to be a candidate for any county or municipal office by written petition signed by at least twenty-five electors qualified to vote in the election to fill said office, when such petition has been filed with him before the first Tuesday in May in the year in which a state-wide primary election is held.

The secretary of state shall also certify to the judge of probate of the several counties, as the case may be, the name

of any qualified elector who has been requested to be a candidate for any state or federal office by written petition signed by at least three hundred electors qualified to vote in the election to fill said office provided such petition is filed with the secretary of state before the first Tuesday in May in the year in which a state-wide primary election is held. The judge of probate shall cause to be printed upon the ballots, the name, or names, of such qualified elector or electors, as the case may be.

Provided, however, that the judge of probate of the several counties in this state are hereby prohibited from causing to be printed on the ballot to be used in their respective counties, the name of any independent candidate for any state, county, or federal office who has not filed his declaration to become such a candidate before the first Tuesday in May in the year in which a state-wide primary election is held. (1935, pp 237, 894; 1945, p. 76, appvd. June 9, 1945.)

§ 145 (2). Electing or nominating two or more members of legislature at same time; numbering of places; procedure in primary.—In all primary and general elections for members of the legislature wherein two or more of such members are to be nominated or elected at the same time, each of such places to be filled shall be designated by number. In case candidates for two or more of such offices are to be nominated in a primary each of said places to be filled shall be numbered, and each candidate for such office in the announcement of his candidacy shall designate the number of the office for which he is a candidate; the same person shall not be a candidate for or be permitted to file his declaration for more than one of such places; no ballot shall be counted for any candidate except for the place and number for which he announced in his declaration filed with the

legally constituted authorities designated to receive and file his declaration of candidacy. (1965, p. 599, § 1, appvd. Aug. 16, 1965).

§ 145 (3). Name of candidate not to be certified or placed on ballot unless declaration of candidacy filed on or before March 1 of election year; exceptions.—(1) The secretary of state is hereby prohibited from certifying to the judges of probate of the several counties and such judges of probate are prohibited from causing to be printed on the ballots for a general election the name of any candidate for a state, district or federal office who does not file a declaration of intention to become a candidate for such office with the secretary of state on or before the first day of March of the year in which such general election is held. Such declaration shall include a statement designating the political party whose nomination for such office the person seeks; or if such person is not a candidate for nomination by a political party, then such declaration shall state that such person will be an independent candidate for the office. Provided, however, this section shall not apply to the printing on the ballot of the names of persons nominated by political parties to fill vacancies in such parties' nominations for state, district or federal offices when the vacancy occurs after March first of the year in which a general election is held; and the name of every candidate nominated by a political party to fill any such vacancy shall be printed upon the ballot for the general election, if such name is duly certified by the party, within the time prescribed by law, as such party's nominee.

(2) The judges of probate of the several counties are hereby prohibited from causing to be printed on the ballots for any general election in their respective counties the names of any candidate in such election for a county office who does

not file a declaration of intention to become a candidate for such office with him on or before the first day of March of the year in which such general election is held. Such declaration shall include a statement designating the political party whose nomination for such office the person seeks; or if such person is not a candidate for nomination by a political party, then such declaration shall state that such person will be an independent candidate for the office. Provided, however, this section shall not apply to the printing on the ballot of the names of persons nominated by political parties to fill vacancies in such parties, nominations for county offices when the vacancy occurs after March first of the year in which a general election is held; and the name of every candidate nominated by a political party to fill any such vacancy shall be printed upon the ballot for the general election, if such name is duly certified by the party, within the time prescribed by law, as such party's nominee.

(3) Qualification on or before the first day of March of an election year as a candidate for nomination in a primary election as a political party's candidate in the general election shall for the purposes of enforcing this section be deemed a filing of a declaration of intention to be a candidate for such office in the general election within the meaning of such term as used in this section.

(4) The provisions of this section are supplemental. It shall be construed in pari materia with other laws regulating elections; however those laws or parts of laws which are in direct conflict or inconsistent herewith are hereby repealed. (1967, Ex. Sess., No. 243, appvd. May 11, 1967.)

§ 146. Designating certain officers by number.—In all primary and general elections of associate justices of the supreme court of Alabama, justices of the court of appeals

of Alabama, judges of the circuit courts and associate members of the public service commission wherein two or more of such justices, judges or officers are to be elected, at the same time, each of such places to be filled shall be designated by number. (1927, p. 409.)

§ 147. Announcements and ballots to contain number of office sought.—Every candidate for the offices mentioned in the preceding section shall in the announcement of his candidacy designate the number of the office for which he is a candidate and the ballots of such election shall be numbered accordingly. (1927, p. 409.)

§ 148. (463) (373) (1607) Ballots; how printed.—The ballots printed in accordance with the provisions of this chapter shall contain the names of all candidates nominated by caucus, convention, mass meeting, primary election, or other assembly of any political party or faction, or by petition of electors and certified as provided in section 145 of this title, but the name of no person shall be printed upon the ballots who may, not less than twenty days before the election, notify the judge of probate in writing, acknowledged before an officer authorized by law to take acknowledgments, that he will not accept the nomination specified in the certificate of nomination or petition of electors. The name of each candidate shall appear but one time on said ballot, and under only one emblem. (1909, p. 277.)

§ 153 (1). Designation of different offices of same classification.—Whenever nominations for two or more offices of the same classification are to be made, or whenever candidates are to be elected to two or more offices of the same classification, at the same primary, general, special or municipal election, each office shall be separately designated by number on the official ballot as "Place No. 1," "Place No.

2," "Place No. 3," and so forth; and the candidates for each place shall be separately nominated or elected, as the case may be. In the case of primary elections, the designations required herein shall be made by the state executive committee of the political party holding the election. Each candidate for nomination for such office shall designate in the announcement of his candidacy, and in his request to have his name placed on the official primary ballot, the number of the place for which he desires to become a candidate. The name of each qualified candidate shall be printed on the official ballot used at any such election beneath the title of the office and the number of the place for which he is seeking nomination or election. No person shall be a candidate for more than one such place. Provided, however, that this provision shall not apply to counties having a population of 500,000 or more according to the last or any subsequent federal census except as to judicial officers and members of congress. (1961, Ex. Sess., p. 2235, § 1, appvd. Sept 15, 1961.)

§ 157. (471) (381) (1622) To vote a straight party ticket.—If the elector desires to vote a straight ticket, that is, for each and every candidate for one party for whatever office nominated, he shall mark a cross mark (x) in the circle under the name of the party at the head of the ticket.

§ 159. (473) (383) To vote for two or more candidates on different tickets.—When two or more candidates are to be elected to the same office and he desires to vote for candidates on different tickets for such office, he may make a cross mark (x) before the names of the candidates for whom he desires to vote on the other ticket, and must also erase an equal number of names of candidates on his party ticket for the same office for whom he does not desire to vote.

§ 160. (474) (384) To vote a split ticket.—If the elector desires to vote a split ticket, that is, for candidates of differ-

ent parties, he may make a cross mark (x) in the voting space before the name of each candidate for whom he desires to vote on whatever ticket he may be.

§ 161. (475) (385) When straight ticket does not contain names of all officers.—If the ticket marked in the circle for a straight ticket does not contain the names of candidates for all offices for which the elector may vote, he may vote for candidates for such offices so omitted by making a cross mark (x) before the names of candidates for such offices on other tickets, or by writing the names, if they are not printed, upon the ballot in the blank column under the title of the office.

§ 162. (476) (386) To vote for person whose name is not on ballot.—If the elector desires to vote for any person whose name does not appear upon the ballot, he can so vote by writing the name in the proper place on the blank column.

§ 274. (588) Committee to receive, expend, audit and disburse money or funds contributed.—Within five days after the announcement of his candidacy for any office, each candidate for a state office shall file with the secretary of state, and each candidate for a county office or the state house of representatives shall file with the judge of probate of the county, and each candidate for a circuit or district office, including the state senate, shall file with the judge of probate of each county which is embodied in said circuit or district, a statement showing the name of not less than one nor more than five persons elected to receive, expend, audit, and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such persons to act

as such committee, but any candidate, if he sees fit to do so, may declare himself as the person chosen for such purpose. If the statement required herein shall have been postmarked at any United States post office not later than midnight of the fifth day after the announcement of his candidacy, the candidate shall be deemed to have complied with the requirements of this section as to filing such statement within five days after the announcement of his candidacy. Such committee shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee; he shall keep detailed account of receipts, payments and liabilities. The said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed, or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. If any vacancies be created by death or resignation or any other cause on said committees, said candidate may fill such vacancies or the remaining members shall discharge and complete the duties required of said committee as if such a vacancy had not been created. No candidate for nomination or election shall expend any money directly or indirectly in aid of his nomination or election except by contributing to the committee designated by him as aforesaid. (1915, p. 250; 1959, p. 1036, appvd. Nov. 13, 1959.)

§ 275. (589) Candidate acting as own committee.—Any person who shall act as his own committee shall be governed by the provisions of this article relating to committees designated by candidates. Failure to make the declaration of appointment or selection by any candidate as herein required is declared to be a corrupt practice, and in addition the name of such candidate so failing shall not be allowed to go upon the ballot at such election. (1915, p. 250.)

§ 336. Election by party as to whether it will come within primary law.—A primary election, within the meaning of this chapter, is an election held by the qualified voters, who are members of any political party, for the purpose of nominating a candidate or candidates for public or party office. Primary elections are not compulsory. A political party may, by its state executive committee, elect whether it will come under the primary election law. All political parties are presumed to have accepted and come under the provisions of the primary election law, but any political party may signify its election not to accept and come under the primary election law by filing with the secretary of state, at least sixty days before the date herein fixed for the holding of any general primary election, a statement of the action of its state executive committee, certified by its chairman and secretary, which statement shall contain a copy of the resolution or motion adopted declining to accept and come under the primary election law. If a political party declines to accept and come under the primary election law it shall not change its action and accept and come under the primary election law until after the next general election held thereafter. The state executive committee of a political party may determine from time to time what party officers shall be elected in the primary; provided, candidates for all party offices shall be elected under the provisions of this chapter unless the method of their election is otherwise directed by the state executive committee of the party holding the election. (1931, p. 73.)

§ 337. What are political parties within meaning of chapter.—An assemblage or organization of electors which, at the general election for state and county officers then next preceding the primary, cast more than twenty percent of the entire vote cast in any county is hereby declared to be a

political party within the meaning of this chapter within such county; and an assemblage or organization of electors which, at the general election for state officers then next preceding the primary cast more than twenty percent of the entire vote cast in the state, is hereby declared to be a political party within the meaning of this chapter for such state. (1931, p. 73.)

§ 340. Date of elections.—If any primary elections are held at the expense of the state or counties, except special primary elections, they shall be held on the first Tuesday in May, 1940, and on the first Tuesday in May every two years thereafter, and, when necessary, as hereinafter provided, a second primary shall, be held on the fourth Tuesday next thereafter following said primary election. The second primary election shall be held by the same election officers, who held the first primary election, and be held at the same places the first primary election was held. No primary shall be held by any political parties for the nomination of candidates except as herein provided. Primary elections herein provided for shall be held at the regular polling places established for the purpose of holding general elections. (1931, p. 73; 1939, p. 823.)

§ 344. Certification of names of candidates by chairman.—The chairman of the state executive committee of each party entering a primary election shall, not less than fifty-five days prior to the date of holding the election, certify to the secretary of state the names of all candidates for nomination to federal, state, circuit, and district offices, the state senate and house of representatives, and all other candidates except candidates for county offices. The chairman of the county executive committee of each party entering the primary election shall, not less than fifty-five days prior to the

date of holding the election, certify to the probate judge the names of all candidates for nomination to county offices. The secretary of state shall, not less than forty-five days prior to the date of holding the primary election, certify to the probate judge of every county in which the election is to be held the names of the opposed candidates for nomination to federal, state, circuit, and district offices, the state senate and house of representatives, and all other opposed candidates, except candidates for county offices. The probate judge of each county shall have the ballots prepared for the primary election. If a legally qualified candidate for nomination to an office is unopposed when the last date for certifying candidates has passed, his name shall not be printed on the ballots to be used in the primary election, and he shall be the nominee of the party with which he has qualified for the office. The probate judge shall have the ballots so printed that the names of the opposing candidates for any office to be voted for by the voters of more than one county shall, as far as practicable, alternate in position upon the ballot so that the name of each candidate shall occupy, with reference to the name of every other candidate for the same office, first position, second position, and every other position, if any, upon an equal number of ballots. When printed, the ballots shall be distributed impartially and without discrimination by the probate judge. (1931, p. 73; 1947, p. 444, appvd. Oct. 9, 1947; 1956, 1st Ex. Sess., p. 209, appvd. Feb. 24, 1956.)

§ 348. Filing declaration of candidacy.—Any person desiring to submit his name to the voters in a primary election shall, not later than March first, next preceding the holding of such primary election, file his declaration of candidacy in the form prescribed by the governing body of the party with the chairman of the county executive committee if he be a

candidate for a county office, and with the chairman of the state executive committee, if he be a candidate for any office except a county office, and in like manner, and not later than March first, next preceding the holding of such primary election, pay any assessments that may be required to be paid by him. (1931, p. 73, 1945, p. 689, appvd. July 6, 1945.)

§ 413. (674) Mass meetings or beat meetings held.—When any political party shall desire to hold any mass meeting, beat meeting, or other meeting of the voters of such party for the purpose of nominating any candidate or candidates for public office, to be voted for in a general election in Alabama or for the purpose of selecting delegates, or other representatives to any convention which may select such candidates for public office, or when any such party shall desire to hold such mass meeting, beat meeting, or other meeting of the voters of such party for the purpose of selecting committeemen, representatives or other party officers of such party; all of such meetings shall be held at the times and places set out in the succeeding section, and at no other times or places. (1915, p. 622.)

§ 414. (675) When and where such meetings held.—All such meetings shall be held in a hall, room, or open place at or in the immediate vicinity of the voting place of the respective precinct or voting district and on the first Tuesday in May in even-numbered years. The general public is privileged to attend such meetings, but not to participate. (1915, p. 622; 1947, p. 34, appvd. July 11, 1947.)

§ 415. (676) Special elections and vacancies which are excepted from article.—This article shall not apply where a special election is called for the election of a public officer, for which said party has no candidate, or where by death,

resignation, or otherwise, a vacancy has occurred in any nomination made by such party; and this article shall not apply to municipal elections. (1915, p. 622.)

§ 416. (3957) Mass meeting, beat meeting, unlawfully held.—Any person or persons who shall hold, attend or participate in the holding of any meeting for the purpose of nominating a candidate or candidates for public office, to be voted for at any general election in Alabama, or for the purpose of electing delegates or other representatives to any convention which may select such candidates for public office, at any time or place other than as provided for in article 2 of this chapter, relating to mass meetings or beat meetings, or who shall otherwise violate the laws of this state regulating mass meetings or beat meetings, shall be guilty of a misdemeanor. (1915, p. 622.)

SUPREME COURT, U. S.

JAN 17 1969

JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 647

SALLIE M. HADNOTT; REVEREND WILLIAM McKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR.; and THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, a corporation, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

MABEL S. AMOS, as Secretary of the State of Alabama; EDWARD A. GROUBY, as Judge of Probate for Autauga County, Alabama; and all other Judges of Probate of the State of Alabama, jointly and severally, who are similarly situated; ALBERT P. BREWER, as Governor of the State of Alabama; MacDONALD GALLION, as Attorney General of the State of Alabama, and their successors in each office,

Appellees,

EDWARD F. MAULDIN, as Chairman of Alabama Citizens for Humphrey-Muskie, for himself and all other persons similarly situated,

Appellee-Intervenor,

and,

JAMES DENNIS HERNDON, Judge of Probate of Greene County, Alabama,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA AND IN THE MATTER OF CONTEMPT OF COURT BY JAMES DENNIS HERNDON.

BRIEF OF JAMES DENNIS HERNDON

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA AND IN THE MATTER OF CONTEMPT OF COURT BY JAMES DENNIS HERNDON.

BRIEF OF JAMES DENNIS HERNDON

QUESTION PRESENTED

Whether this Court should issue against the Defendant, James Dennis Herndon, its rule to show cause, if any he have, as to why he should not be adjudged in contempt of this Court.

STATEMENT OF THE CASE

1. Appellants instituted suit in the United States District Court of the Middle District of Alabama on September 13, 1968, against certain officials of the State of Alabama including the Governor, Attorney General, Secretary of State, together with "Edward A. Grouby, as Judge of Probate for Autauga County, Alabama; and all other Judges of Probate of the State of Alabama jointly and severally, who are similarly situated."

2. On September 18, 1968, the United States District Court for the Middle District of Alabama issued its Temporary Restraining Order requiring all ballots for the general election to be held on November 5, 1968, to include the names of all State and appropriate local NDPA candidates. A copy of this Temporary Restraining Order was served on the Defendant, James Dennis Herndon, by certified mail.

3. While this Temporary Restraining Order was in force, the Defendant, James Dennis Herndon, ordered from the printer the paper absentee ballots to be used in Greene County in connection with the election of November 5, 1968, and directed that the names of all State and appropriate local NDPA candidates be included thereon.

4. On October 11, 1968, the United States District Court for the Middle District of Alabama entered its Order dissolving the Temporary Restraining Order previously issued in this cause and further holding the Alabama Corrupt Practices Act and the Garrett Act to be constitutional on their face and as applied, but enjoining the Defendants from disqualifying any NDPA candidate for the alleged failure to conduct a mass meeting in Huntsville on May 7, 1968.

5. On October 14, 1968, a copy of this order was served by certified mail upon the Defendant, James Dennis Herndon, and on said date, the Defendant, James Dennis Herndon, ordered from the printer the Greene County ballots to be used in the general election of November 5, 1968. The names of NDPA candidates for local office in Greene County were not included on this ballot for the reason that the Defendant, James Dennis Herndon, had determined such candidates failed to comply with the Alabama Corrupt Practices Act requirements.

6. On October 12, 1968, Appellants filed in this Court an application for restoration of the temporary relief praying: ". . . . that the Temporary Restraining Order of the United States District Court for the Middle District of Alabama be restored during the pendancy of this Appeal . . . .".

7. On October 14, 1968, this Court granted Appellants application for restoration of Temporary relief pending oral argument on October 18, 1968.

8. On October 19, 1968, this Court continued its order restoring the temporary relief pending action on the jurisdictional statement.

9. No copy of the orders of this Court of October 14, 1968, or October 19, 1968, were ever served upon or otherwise delivered to the Defendant, James Dennis Herndon.

10. On November 5, 1968, the general election was conducted in Greene County, Alabama with the ballots ordered by the Defendant, James Dennis Herndon, on October 14, 1968, which ballots did not include the names of local NDPA candidates for county office.

11. On or about November 15, 1968, Appellants filed in this Court a Motion for an Order to Show

Cause as to why James Dennis Herndon should not be held in contempt for failure to include the names of local NDPA candidates for county office on the ballot used in the general election of November 5, 1968, in Greene County, Alabama. The Appellants in this Motion aver that they ". . . . are informed and believe and based upon the following aver that said failure and refusal of the Defendant, James Dennis Herndon to place the names of the above named NDPA nominees on the ballot was done willfully and with actual knowledge of the order of this Court."

12. On or about the 29th day of November, 1968, the Defendant, James Dennis Herndon, filed in this Court his response to Appellants' Motion for Rule to Show Cause in which he unequivocally denies under oath that the omission of the names of the candidates of the NDPA for county offices upon the official ballot for the general election held on November 5, 1968, was willfully or contumaciously done with knowledge of the said orders of this Court.

13. On November 20, 1968, the United States filed a series of Motions in this case in the United States District Court for the Middle District of Alabama seeking relief in several respects. Pursuant to these motions, said United States District Court entered orders on November 21, 1968: (1) Designating the United States as an Amicus Curiae and a party in the case; (2) Adding as a party defendant in the United States District Court for the Middle District of Alabama in this cause, the Defendant, James Dennis Herndon and others; (3) Directing the Defendant, James Dennis Herndon, and others, to show cause, if any they have, why they should not be restrained pending a final determination of this action from giving

effect to the results of the November 5, 1968, election in Greene County for local county offices.

14. On December 20, 1968, the United States District Court for the Middle District of Alabama issued its order, with consent of the Defendant, James Dennis Herndon, and others, enjoining and restraining the Defendant, James Dennis Herndon and others from giving effect to the results of the November 5, 1968, election in Greene County for local county offices.

ARGUMENT

I.

There is no showing in this case of probable cause to believe that the Defendant, James Dennis Herndon, willfully and with actual notice of this Court's order restoring the Temporary Restraining Order issued by the United States District Court for the Middle District of Alabama, omitted from the Greene County ballot the names of NDPA candidates for local county offices.

The Motion for Rule to Show Cause filed by Appellants against the Defendant, James Dennis Herndon, in this Court alleges in substance that based upon certain averred facts, Appellants believe that the acts complained of were willfully done by the Defendant, James Dennis Herndon, with actual knowledge of the order of this Court. The facts averred as the basis for such belief are: that the order was widely publicized and was a matter of common knowledge among residents of Alabama associated with the State's political life; that one of the counsel for the Appellees was notified by telephone of the entry of said order on October 19, 1968; and that the Defendant, James Dennis Herndon, had provided "varying" reasons for the omission

of such names from the ballot. Analysis of these matters asserted as the basis for Appellants' belief will show that Appellants' conclusion is unwarranted.

All orders of the United States District Court for the Middle District of Alabama which affected the Defendant, James Dennis Herndon, were served upon him by certified mail. Admittedly, no copy of any order of the Supreme Court of the United States was served upon or delivered to him by anyone. The Appellants do not so contend. The Appellants do contend, however, that the Defendant, Judge Herndon, had actual notice by virtue of publicity in the local news media concerning this Court's orders in this case.

Judge Herndon, in his deposition, has testified that he became aware that an appeal was taken from the judgment of the United States District Court for the Middle District of Alabama to the Supreme Court and became aware that NDPA presidential electors would be included on the ballot for the general election of November 5, 1968. He did not understand from the the articles seen by him that such order had application to local NDPA candidates for county office. This conclusion was further strengthened by the fact that no copy of any order of this Court was mailed or otherwise delivered to him. Within the week after the recepit by him of the October 11, order of the United States District Court for the Middle District of Alabama dissolving the Temporary Restraining Order, the Defendant, James Dennis Herndon, notified Mr. Peter J. Kirksey, Chairman of the Greene County NDPA that the names of local candidates of the NDPA for county office would not appear on the November 5, 1968, general election ballot. Mr. Kirksey is the person who filed the certificate of mass meeting with Judge

Herndon nominating the six local NDPA candidates. Judge Herndon also notified Mr. William McKinley Branch, NDPA candidate for the United States House of Representatives from the Fifth District of Alabama, that the local NDPA candidates for county office would not appear on the general election ballot for November 5, 1968, because of their failure to comply with the Alabama Corrupt Practices Act requirements.

Viewed in the light of the above facts as shown by the sworn response of the Defendant, James Dennis Herndon, heretofore filed in this Court and in the Deposition of Judge Herndon taken by Appellants and filed as a part of the record herein, it is clear that the reasons assigned by Judge Herndon for the omission of local NDPA candidates for county office from the Greene County ballot for the election of November 5, 1968, are not "varying" as alleged by Appellants. Assuming that the conversations with Judge Herndon are accurately reported, there is no inconsistency or variation between the reasons then and now assigned by Judge Herndon for his action. In the affidavit of Dr. John L. Cashin, Jr. (Ex. A to Motion for Rule to Show Cause) it is obvious that the Court order referred to by Judge Herndon is the order of the United States District Court for the Middle District of Alabama entered on October 11, 1968. Both of the newspaper articles attached to the Motion for Rule to Show Cause (Ex. B and C) evidence an understanding on Judge Herndon's part that the local NDPA candidates for county office did not participate in the appeal and that the order to the Supreme Court had no application to them. Considering the opportunity for misconstruction in the newspaper rewrite room, the newspaper articles state in remarkably few words precisely

the same thing that Judge Herndon has said in his response heretofore filed in this Court and in his deposition.

Appellants further assert that on October 19, 1968, the Clerk of this Court notified Mr. John Bookout, Deputy Attorney General of the State of Alabama, and one of the attorneys of record for Appellees in this cause, by telephone of the entry of the order of October 19th. Such notification to Mr. Bookout was neither actual nor constructive notification to the Defendant, James Dennis Herndon.

This action was instituted as a class action against Judge Edward A. Grouby, as Probate Judge of Autauga County, Alabama, as representative of the Probate Judges of Alabama similarly situated, and was allowed by the Court to be prosecuted as a class action. The reason for allowing class actions is to eliminate the inconvenience and expense of making all persons of the class affected parties when less than all adequately represent the interests of the class. While all members of the class are obviously bound by the adjudication, only those who are named and served as representatives of the class are "parties".

The United States District Court for the Middle District of Alabama recognized that the Defendant, James Dennis Herndon, was not a "party" to the original proceedings in this cause, and on November 21, 1968, entered an order adding James Dennis Herndon as a party Defendant in this case in response to the Motion of the United States praying such action. Admittedly, Mr. Bookout did not notify Judge Herndon. Obviously, notice of the entry of an order given to counsel of record is not constructive notice to the members of a class who are not themselves "parties" to the suit.

It seems clear that there is neither allegation nor evidence that Judge Herndon had actual or constructive knowledge of the orders of this Court entered on October 14th and 19th restoring the temporary relief granted by the United States District Court for the Middle District of Alabama at any time prior to the general election held on November 5, 1968. On the contrary, there is every reason to believe that Judge Herndon did not willfully disobey this Court's orders. In the first place, no conceivable purpose would be served by such disobedience. To willfully disobey would be but to invite severe adverse consequences. The fact is, that in May of 1968, each of the present NDPA candidates for county office ran in the Democratic primary as a candidate for the Democratic nomination for such office. Each of the present NDPA candidates properly qualify to run in the Democratic primary and their names were each placed on the ballot. There was no suit or judicial compulsion to force the inclusion of these candidates on the Democratic primary ballot, yet when they properly qualified, Judge Herndon properly placed their names on the ballot.

Absentee ballots must be ordered and made available several weeks in advance of the general election. Judge Herndon ordered the Greene County absentee ballots in September, 1968, during the pendancy of the Temporary Restraining Order issued by the United States District Court for the Middle District of Alabama. Judge Herndon had knowledge of this Temporary Restraining Order, a copy of it having been forwarded from the Court to him by certified mail. In obedience to this order, Judge Herndon included the names of the local NDPA candidates for county office on the absentee ballots. In each of these instances, the same

identical candidates were seeking the same offices against the same opponents in the same year in Greene County. When these candidates properly qualified for the Democratic primary, Judge Herndon obeyed the law without any judicial compulsion and placed their names upon the ballot. With regard to the absentee ballot for the general election, Judge Herndon placed these candidates' names on the absentee ballots in obedience to the Temporary Restraining Order issued by the United States District Court for the Middle District of Alabama, although he considered that they had failed to comply with the Corrupt Practices Act. These are not the acts of a man who would willfully defy an order of the Supreme Court of the United States of which he had knowledge.

It is respectfully submitted that Appellants' allegations and evidence fail to show probable cause to believe that the Defendant, James Dennis Herndon, has willfully disobeyed any order of Court with actual knowledge thereof and that Appellants' Motion for Rule to Show Cause should be denied.

II.

The Defendant, James Dennis Herndon, respectfully submits that the proper forum for further inquiry concerning this matter, if such be indicated, is the United States District for the Middle District of Alabama.

It is the Temporary Restraining Order of the United States District Court for the Middle District of Alabama which Appellants charge this Defendant has violated. This Temporary Restraining Order has initially granted by the United States District Court for the Middle District of Alabama on September 18, 1968,

and after having been once extended was dissolved by that Court on October 11, 1968. On October 12, 1968, an application for restoration of temporary relief previously granted by the United States District Court for the Middle District of Alabama was filed in this Court. The prayer of such application was: ". . . . that the Temporary Restraining Order of the United States District Court for the Middle District of Alabama be restored during the pendancy of this appeal. . . . . " On October 14, 1968, this Court granted Appellants' application for restoration of temporary relief by an order reading in part as follows: "The application for restoration of temporary relief is granted pending oral argument on the application which is set for Friday, October 18, 1968, at 9:00 a.m." On October 19, 1968, this Court continued in effect its order of October 14, said order providing in part as follows: "The order entered October 14, 1968, restoring Temporary relief is continued pending action upon the jurisdictional statement which has been filed."

It is respectfully submitted that the effect of the foregoing orders is to re-vitalize the Temporary Restraining Order of the United States District Court and did not amount to the issuance of a Temporary Restraining Order by this Court. This is not such a situation as was presented in *United States v. Ross R. Barnett, et al.*, 376 US 681. In the *Barnett Case*, the Appellate Court, the Court of Appeals for the Fifth Circuit, had actually issued its own Temporary Restraining Order. There was a similar permanent injunction issued by the District Court pursuant to mandate from the Court of Appeals. However, the conduct of the Defendants was alleged to violate both the Temporary Restraining Order of the Court of

Appeals and the permanent injunction of the District Court. Under such circumstances it was apparent that either the Court of Appeals or the District Court could entertain a contempt proceeding against the Defendants. In the present case, the only injunctive order issued is that of the United States District Court for the Middle District of Alabama. It is this injunctive order which Appellants charge this Defendant with violating. The United States District Court for the Middle District of Alabama is the proper forum for any further proceedings in connection with this matter, if the same should be indicated.

There are many practical reasons for this conclusion. The United States District Court for the Middle District of Alabama added this Defendant as a party Defendant in this suit in that Court on November 21, 1968, and did on December 20, 1968, issue its Temporary Injunction enjoining and restraining this Defendant and others from giving effect to the results of the November 5, 1968, election in Greene County for the county offices here involved. Thus, the District Court is presently exercising jurisdiction over this Defendant in this case and is presently protecting the Appellants by this Temporary Injunction, from the consequences of the omission of the names of the local NDPA candidates for county office from the November 5, 1968, general election ballot.

In a proper case, it is obvious that an Appellate Court must sometimes undertake the hearing of a contempt proceeding. Such a trial can be accomplished by having the evidence taken before a commissioner as was done in the case of *United States of America v. Joseph F. Shipp, et al.*, 203 US 563, or the evidence could be heard by the Court. The problems of such pro-

ceedings were pointed up by Mr. Justice Black in his dissenting opinion in *United States v. Barnett*, 376 US 681, wherein he said:

> "The business of trial courts is to try cases. That of Appellate Courts is to review the records of cases coming from trial courts below. In my judgment it is bad for Appellate Courts to be compelled to interrupt and delay their pressing Appellate duties in order to hear and adjudicate cases which trial courts have been specially created to handle as a part of their daily work."

The Solicitor General in his Brief in this cause for the United States as Amicus Curiae, concludes at page 33 of his Brief that the proper course with regard to the contempt aspect of this proceeding is: "To undertake such further proceedings as the District Court may deem appropriate with respect to the alleged contempt of orders issued in this cause by Probate Judge Herndon or other officials, as circumstances may suggest." By footnote to the foregoing statement, the Solicitor General suggest further proceedings in the District Court with respect to the Motion for contempt because: "As presently advised, we do believe the necessary facts have been developed and deem the further exploration of the issue here premature." This Defendant concurs with these conclusions of the Solicitor General.

CONCLUSION

For the reasons stated this Defendant concludes:

1. That there is neither allegation nor evidence of any willful violation by this Defendant of any order of this Court or of the United States District Court for the Middle District of Alabama;

2. That the proper forum for the further investigation of this Defendant's alleged contempt, if such be indicated, is the United States District Court for the Middle District of Alabama;

3. That the Motion of Appellants for the issuance of a Rule to Show Cause why he should not be adjudged in contempt of this Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of the Defendant, James Dennis Herndon, on Honorable Charles Morgan, Jr., 5 Forsyth Street, N.W., Atlanta, Georgia 30303, Honorable Orzell Billingsley, Jr., 1630 Fourth Avenue, North, Birmingham, Alabama 35203, and Honorable George W. Dean, Jr., P. O. Box 248, Destin, Florida, Attorneys for Appellants, and upon Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C., Attorney for *amicus curiae*, and Honorable L. Drew Redden, Special Assistant Attorney General of Alabama, 1033 Frank Nelson Building, Birmingham, Alabama 35203, this 16th day of January, 1969.

PERRY HUBBARD, *of Counsel for the Defendant James Dennis Herndon*

SUPREME COURT OF THE UNITED STATES

No. 647.—October Term, 1968.

Sallie M. Hadnott et al., Appellants, v. Mabel S. Amos, etc., et al. } On Appeal From the United States District Court for the Middle District of Alabama.

[March 25, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

This suit is a class action brought by the National Democratic Party of Alabama (NDPA) against Alabama state officials who had refused to include various NDPA candidates on the ballot for various county and statewide offices. As the complaint sought an injunction against enforcement of Alabama statutes on federal constitutional grounds, a three-judge federal court was impaneled. 28 U. S. C. § 2281.

The District Court entered a temporary restraining order. Thereafter appellees filed their answer challenging, *inter alia*, the qualifications of NDPA candidates because of their failure to satisfy certain specified requirements of Alabama law. On October 11, after a hearing on the merits, the three-judge court, by a divided vote, dissolved the temporary injunction and upheld on their face and as applied all the challenged Alabama statutes.

Appellants appealed to this Court (28 U. S. C. § 1253) and on October 14 we restored the District Court's temporary restraining order, saying: "The application for restoration of temporary relief is granted pending oral argument on the application, which is set for Friday, October 18, 1968, at 9:00 A. M. The case is placed on the summary calendar."

And on October 19, 1968, we entered an additional order providing in part:

> "The order entered October 14, 1968, restoring temporary relief is continued pending action upon the jurisdictional statement which has been filed."

NDPA candidates, mostly Negroes, were elected to various local offices in Etowah, Marengo, and Sumter Counties. But in Greene County the NDPA candidates for local office were left off the ballot except for absentee voters. In Greene County the only candidates appearing on the ballot were the regular Democratic Party nominees for local offices and they received between 1,699 and 1,709 votes each. It appears that NDPA candidates in Greene County would have won had they been on the ballot [1] for 1,938 ballots were marked for the NDPA "straight ticket."

On November 15 appellants filed in this Court a motion to show cause why James D. Herndon, Probate Judge, Greene County,[2] should not be held in contempt and why the election in Greene County should not be set aside and a new one held. Later the United States moved in the District Court for relief and that court issued a rule to show cause why the results of the November election in Greene County should not be enjoined. The District Court stayed giving effect to the Greene County election.

We have heard argument on the jurisdictional statement and on the motion to hold Judge Herndon in contempt. On the merits of the appeal, we reverse.

First. The Alabama Corrupt Practices Act requires each candidate within five days "after the announcement

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[1] NDPA ran mostly Negro candidates—60 out of 67. In Greene County, Negroes of voting age are in a numerical majority—5,001 Negro, 1,649 white, according to the 1960 census.

[2] Under Alabama law the probate judges have responsibility for preparing ballots to be used in each of the State's counties.

of his candidacy for any office" to file a statement showing "the name of not less than one nor more than five persons" chosen to receive, expend, audit, and disburse funds for his election. Ala. Code, Tit. 17, § 274 (1958).

The disqualification of the NDPA candidates for their alleged failure to satisfy this provision of the Alabama Act implicates Probate Judge Herndon, who was responsible for the preparation of the Greene County ballot which omitted their names.

In this case the black candidates for Greene County offices designated finance committees in February 1968 prior to their entry in the Democratic primary. Appellees contend that it was sufficient to justify Judge Herndon's omission of the names that the NDPA candidates did not file a second designation of financial committee after May 7, the date of the primary, and the date on which those candidates were nominated by the NDPA Appellants contend that disqualification for that reason constituted discriminatory enforcement of the Corrupt Practices Act in violation of the Equal Protection Clause. Since the names of the white candidates who won the May 7 primary were placed on the ballot, although they also did not file a second designation after that date, appellees clearly have the burden of justifying the denial of ballot places to the black NDPA candidates. Appellees have failed to satisfy that burden.[3]

Alabama law requires all candidates for local office, not selected in primaries, to be nominated by mass meeting on the first Tuesday in May of the election year. Ala. Code, Tit. 17, §§ 413, 414 (1958). The certificate of nomination sent to Judge Herndon, probate judge for

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[3] After first notifying the NDPA of its failure to file a certified list of its candidates with her office, the Secretary of State then notified the party of her willingness to accept such nominations filed by September 5. According to the Secretary of State, the NDPA complied with her condition by filing on time.

Greene County, on September 4, stated that NDPA nominees had been selected pursuant to a mass meeting.

On September 18 the District Court temporarily restrained the omission from the ballot of NDPA candidates for state and local office. That restraint was dissolved on October 11. Meanwhile counsel for the white Greene County candidates, who was the county solicitor, prompted Judge Herndon to file an affidavit which he stated that to the "best of my knowledge and belief" the NDPA held no local mass meeting on May 7 at which nominations were made, and further that none of the six NDPA candidates "filed or offered to file in my office" the designation of financial committee required by the Corrupt Practices Act. Yet when his deposition was taken on December 27, the judge conceded that the mass meeting might have been held without his hearing about it and admitted knowledge that the black candidates had filed designations of financial committee in February. He did not say why in these circumstances the February filing did not suffice for the general election; the designations refer to candidacies for the general election as well as the primary election.[4] Nor did he offer any explanation why if the February filings by the white

[4] The form itself and the instructions on the back of the form make clear that filing of the form fulfills the requirements of the Alabama Corrupt Practices Act for "nomination or election." In the typical form filed, as printed in the dissenting opinion, the committee designated is named "for the purpose of aiding or promoting my *nomination or election*." Moreover, printed instructions on the backside to both "candidates for State offices" and "candidates for County offices" state that

"A copy of this announcement of candidacy filed with the Secretary of State and Probate Judge[s] will meet the requirements of Section 274 of Title 17, Alabama Code of 1940, as amended [Corrupt Practices Act], where the candidate himself (rather than a committee) intends to receive, disburse and report on *all monies used in promoting his nomination or election*."

candidates sufficed for the general election, the filings of the black candidates should be treated differently. The record is therefore utterly devoid of any explanation adequate to satisfy appellees' burden. It is true that at oral argument in this Court counsel for appellees suggested that the Alabama courts might construe the statutory words—"within five days after the announcement of his candidacy . . . each candidate for county office . . . shall file [the designation statement] with the judge of probate"—to require a second filing by losers in a primary who stand at the general election as candidates of another party. But it was not urged, nor could it be on this record, that appellees' distinction between the black and white candidates was rested on that construction.

We deal here with Fifteenth Amendment rights which guarantee the right of people regardless of their color or political persuasion to cast their votes effectively and with First Amendment rights which include the right to band together for the advancement of political beliefs. *Williams* v. *Rhodes*, 393 U. S. 23. While the regulation of corrupt practices in state and federal elections is an important governmental function, we refuse to accept a reading of an Act which gives such a loose meaning to words and such discretionary authority to election officials as to cause Fifteenth and First Amendment rights to be subject to disparate treatment. That risk is compounded here where the penalty is the irrevocable striking of candidates from the ballot without notice or an opportunity for contest and correction.

When the Alabama Act is construed as their opponents were allowed to construe it without suffering disqualification, we conclude that appellants met the same requirements. Unequal application of the same law to different racial groups has an especially invidious connotation.

Second. In 1967 Alabama passed the Garrett Act (L. 1967 Act 243) barring from the ballot in a general election a candidate for a State, district, or federal office, "who does not file a declaration of intention to become a candidate for such office with the secretary of state on or before the first day of March of the year in which such general election is held." The Garrett Act also requires a declaration of the political party whose nomination the candidate seeks; or if he is not a party candidate that he will run as an independent. A like provision bars probate judges from printing on ballots the name of candidates for county offices unless they have filed a declaration of intention on or before the prior March 1. Accordingly, appellees justify their disqualification of NDPA candidates in Etowah, Marengo, and Sumter Counties, and Judge Herndon justifies his omission of those candidates from the Greene Couty ballot, on the ground that they did not comply with the Garrett Act.

Prior to the Garrett Act, every candidate desiring to run in a primary was required to file a declaration of candidacy by March 1. Ala. Code, Tit. 17, § 348 (1958). Independents were exempt from this requirement and they were able to get on the ballot after nomination by a mass meeting held on the first Tuesday in May. *Id.* §§ 413, 414. As a result of the Garrett Act, an independent candidate had to decide whether to run at the same time as candidates in the primary made their determination.

The question is whether the Garrett Act is affected by § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c, which provides in States like Alabama that "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," the State may institute an action in the United States Dis-

trict Court for the District of Columbia for a declaratory judgment that "such qualification, prerequisite standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." It is further provided in § 5 that unless and until the District of Columbia court enters such judgment "no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure." [5]

The Garrett Act is in respects material here on all fours with *Whitely* v. *Williams*, 394 U. S. —, in which we held that a like provision added to the Mississippi Code could not be applied until it had been approved in one of the two ways provided in § 5 of the Voting Rights Act of 1965.

In the *Whitely* case we dealt with a new Mississippi law which, *inter alia*, changed the time for filing a petition as an independent candidate from 40 days before the *general* election to 60 days before the *primary* election.

We held that this new provision was subject to § 5 of the Voting Rights Act of 1965 as it was aimed "at increasing the difficulty for an independent candidate to gain a position on the general election ballot." 394 U. S. —. And we added that that change "might also undermine the effectiveness of voters who wish to elect independent candidates." *Ibid.* The increased barriers placed on independent candidates by Alabama's Garrett Act likewise bring it within the purview of § 5 of the Federal Act. The Alabama officials, therefore, acted unlawfully in disqualifying independent candidates in the 1968 election for failure to comply with the Garrett Act.

[5] Section 5 contains an alternative procedure of submitting the changed provisions to the Attorney General, in which case they become enforceable upon failure of the Attorney General to object.

On the merits, we reverse the District Court and remand the cause with directions (1) to issue an appropriate order requiring the prevailing NDPA candidates in Etowah, Marengo, and Sumter Counties to be treated as duly elected to the offices for which they ran; and (2) to require the state and local officials promptly to conduct a new election in Greene County for the various county offices contested by NDPA candidates,[6] at which election the NDPA candidates for those respective positions shall appear on the ballot.

The motion to hold Judge Herndon in contempt will be disposed of in a separate opinion.

It is so ordered.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

[6] These are the offices of County Commissionr for Districts 1, 2, 3, and 4, and Places 1 and 2 on the County Board of Education.

SUPREME COURT OF THE UNITED STATES

No. 647.—October Term, 1968.

Sallie M. Hadnott et al., Appellants, v. Mabel S. Amos, etc., et al. | On Appeal From the United States District Court for the Middle District of Alabama.

[March 25, 1969.]

Mr. Justice White, with whom Mr. Justice Stewart joins, dissenting in part.

As I understand the arguments in this case, appellees suggest that whatever reasons state officials may have given for excluding appellants from the ballot, the exclusion and the judgment below are sustainable on independent grounds, at least as to the Greene County NDPA candidates. The Corrupt Practices Act, it is said, required the filing of committee designations not only when appellants became Democratic Party candidates* and entered the primary but when, after losing

*At that time they filed designations which were, as the Solicitor General concedes, "in terms directed to the Democratic Primary, rather than the general election." A typical designation read in the relevant part as follows:

"I hereby declare myself to be *a candidate for the Democratic nomination* (or election) *in the Primary Elections* to be held on Tuesday, the 7th day of May, 1968, and on Tuesday, the 4th day of June, 1968, for the office of County Commissioner for

Greene (District, Circuit or *County*, if applicable) #1 (Place Number, if applicable)

"If I am *a candidate for the Democratic nomination* for Judge of a Court of Record, I do further certify that at the time of filing this Declaration of Candidacy I am not under disbarment or suspension.

"I hereby certify and declare that I appoint myself (and hereby accept the appointment) as the sole and only person or committee

the primary, they announced their candidacy under the banner of another party. If the Alabama courts so construed the statute, I would not think the Court would reverse this case unless it held the Corrupt Practices Act unconstitutional. Of course, the Alabama courts have not passed on this question to date. But the issue is not frivolous and I would not construe the statute here in the first instance, which the Court in effect does, but would remand the matter to the three-judge court for its interpretation of Alabama law. On the other issues in the case, I agree with the Court.

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to receive, expend, audit and disburse all monies contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting my nomination or election as *such* candidate for said office in accordance with Sections 274 and 275 of Title 17 of the Code of Alabama of 1950, as amended (Corrupt Practices Act). [Emphasis added.]

"Vassie Knott."

(Signature of Candidate)